No. [redacted] 231

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—vs.—

SALVATORE BENANTI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S APPENDIX

GEORGE J. TODARO,
Attorney for Defendant-Appellant,
135 Broadway,
New York, N. Y.

32 CASE PRESS INC., 82 Beekman St., N. Y.—COrtlandt 7-0484-5

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Docket Entries

CRIMINAL DOCKET

(A)

Crim. No. 5 150/312

THE UNITED STATES

—versus—

SALVATORE BENANTI

Defendant

T 26 Soc. 5008 (b) (1) and 5642 USC

Unlawfully possessed and transported a quantity of untaxpaid distilled spirits.

2 counts

PROCEEDINGS

Date	*Proceedings*
8/ 3/56	—Filed Indictment
8/ 9/56	—Pleads not guilty. Released on own recognizance. See C 150-257 for bail. WALSH, J.
8/ 9/56	—Filed Notice of Appearance of Atty. Lester H. Solomon 160 Broadway.
10/ 9/56	—Trial began before Walsh, J. and jury. Trial concluded. Verdit—Deft. guilty on both counts —Pre-sentence report ordered. Sentence set for 10-30-56 and released on own recognizance. WALSH, J.

Docket Entries

Date	*Proceedings*
10/30/56	Filed judgment — Sentence — Eighteen (18) months on each of counts 1 and 2 to run concurrently at a place of confinment to be designated by the Atty. Genl. of the U. S. Bail fixed at $2000. pending appeal. Remanded. WALSH, Jr.
10/30/56	Issued commitment and copies. (B)
10/30/56	Filed Notice of Appeal dated 10/30/56
11/ 8/56	Filed Transcript of Record of Proceedings dated October 30, 1956
11/ 7/56	Filed Transcript of Record of Proceedings dated October 9, 30, 1956.

A TRUE COPY

HERBERT A. CHARLSON, Clerk
By CATHERINE B. SALAMONE, Deputy

Indictment

(36) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The Grand Jury charges:

On or about the 10th day of May, 1956 in the Southern District of New York, SALVATORE BENANTI the defendant, unlawfully, wilfully and knowingly possessed a quantity of distilled spirits, the immediate container(s) thereof not having affixed thereto in such manner as to be broken on opening the container, stamps evidencing the tax or indicating compliance with the provisions of Chapter 51, Title 26, United States Code, to wit, eleven five gallon cans (Title 26, Sections 5008(b)(1) and 5642, United States Code).

(37) SECOND COUNT

The Grand Jury further charges:

On or about the 10th day of May, 1956 in the Southern District of New York, SALVATORE BENANTI the defendant, unlawfully, wilfully and knowingly transported a quantity of distilled spirits, the immediate container(s) thereof not having affixed thereto in such manner as to be broken on opening the container, stamps evidencing the tax or indicating compliance with the provisions of Chapter 51, Title 26, United States Code, to wit, eleven five gallon cans (Title 26, Sections 5008(b)(1) and 5642, United States Code).

PAUL W. WILLIAMS
United States Attorney

B. J. BUTTENWEISER
Foreman

Testimony

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

New York, October 9, 1956,
10.30 o'clock a.m.

Before:

HON. LAWRENCE E. WALSH,
District Judge.

Appearances:

PAUL W. WILLIAMS, Esq., United States Attorney,
for the Government;
By HERBERT C. KANTOR, Esq., and ARNOLD G.
FRAIMAN, Esq.,
Assistant United States Attorneys.

GEORGE J. TODARO, Esq., Attorney for Defendant.

---

(2) (The following took place in the robing room before the empanelling of the jury:)

Mr. Todaro: Your Honor, I have just been retained by Mr. Benanti. I spoke to him last Saturday. We agreed upon a fee which has not yet been paid. I expect to be paid sometime today.

The former attorney, Mr. Solomon, I understand, was in a peculiar position. He represented two defendants—they are brothers—and one has become a Government witness. Is that correct?

Mr. Kantor: Suppose I state the facts. This case was marked ready and passed about three weeks ago. It has been moved from day to day ever since then.

We were assigned out of the calendar part on Friday. On being assigned out, Angelo Benanti, one of the brothers, pleaded guilty. The other brother is Salvatore Benanti, and he is the defendant that is in this part now.

Mr. Lester Solomon, as far as I know, has been counsel for both of these brothers for the period of the case. He has been in court every day and answered ready for each of them when the case was marked.

I received a phone call yesterday saying that he was going to substitute Mr. Todaro for himself as (3) trial counsel. I spoke to Mr. Solomon later on last night to confirm that. I also spoke to Mr. Todaro earlier yesterday, and Mr. Todaro said at that time there would be no delay, he was ready to go to trial.

Later on that afternoon, he called me back and said he thought there might be some delay. At this time I called Mr. Solomon and asked him what the situation was on the substitution. He said he felt he could not represent both defendants any longer.

I asked him why he had not said something sooner, and he said he just realized on that day that he couldn't.

This is after he had been assigned out for trial.

The Court: Are you ready to go ahead?

Mr. Todaro: Not now.

The Court: There is going to be serious action by me if there is any delay as a result of this switch. I am not going to give a defendant an adjournment for a last minute switch in counsel, and I have under consideration serious action against Mr. Solomon. I think that is a very reckless way to treat this Court.

Mr. Todaro: As far as Mr. Solomon, he should (4) have

realized he couldn't represent two sides. There was a conflict of interest.

The Court: I don't see any conflict of interest at the moment. Whom does he represent now?

Mr. Todaro: He represents one of the brothers, and the one brother who pleaded guilty is a Government witness.

The Court: Is the other brother going to testify?

Mr. Kantor: Yes, he will testify.

The Court: And does Mr. Solomon still represent him?

Mr. Kantor: I am not sure of that either. I spoke to Mr. Solomon with reference to the other brother. I asked him if he would be here today and he said he would not. He mentioned something that he had not gotten his full fee.

As to whether he will represent the other brother, I cannot say.

The Court: Mr. Solomon has not been released by the Court, has he?

Mr. Kantor: No.

The Court: You tell Mr. Solomon to get down here, and I will deal with him.

(5) What kind of a case is this?

Mr. Kantor: It is an alcohol tax case.

The Court: Is it a matter of great complexity?

Mr. Kantor: No, it is quite simple.

The Court: Why, then, is there this need for time? You knew about the situation Saturday, Mr. Todaro.

Mr. Todaro: I got a copy of the indictment. That is all I have, and a little statement I had with my client.

The Court: Tell me what are the facts.

Mr. Kantor: The Government's case will take approximately two hours. The facts are these. A certain car was under observation. Angelo Benanti was seen in that car. He drove uptown and was arrested.

He has made the statement and will testify that earlier that same evening, his brother came to his house and asked

him to drive the car, told him it was alcohol and offered to pay him. That is all.

The Court: I don't see anything so complex about that.

Mr. Todaro: I would want a day or two.

The Court: I have a jury panel here waiting for you to try the case. The talesmen are drawn. They (6) are in the courtroom, and now you come in and tell me you want two days. I don't think your application is timely.

We will go ahead, and tell Mr. Solomon to come down and be here at 12.30.

Mr. Todaro: I did speak to him last night and he said he would be here this morning. I will renew that call.

(The following took place in open court in the presence of the talesmen:)

Mr. Kantor: The Government is ready, you Honor.

Mr. Todaro: The defendant is not ready, if your Honor pleases, and for the record I want to state that I have spoken to this defendant approximately ten or fifteen minutes—

The Court: You made your statement for the record in chambers. I don't want to say anything further in front of the jury panel. I understand your position, and I am directing you to go ahead, anyhow.

Mr. Todaro: Exception.

(7) The Court: Where is the defendant?

All right, we will proceed.

(A jury was duly empanelled and sworn.)

* * * * *

(8) JOHN A. FRANCIS, called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kantor:

Q. Mr. Francis, by whom are you employed? A. By the Police Department of the City of New York.

Q. May I direct your attention to the night of May 9, 1956. Where were you on that night? A. I was in the vicinity of Elizabeth and Spring Street.

Q. What did you observe at that time? A. At that time I was observing the Reno Bar. I had the Reno Bar under observation.

Q. Whom did you observe there? A. On May 9th, I did observe Salvatore Benanti come from and go into the Reno Bar at 168 Elizabeth Street.

Q. Had you seen this man at any other time? A. Yes, I had.

Q. When? A. I had seen him on several occasions prior to that date riding around in a green Chevy.

Q. Did you see that green Chevy on May 9th? A. Yes.

(9) Q. Where? A. It was parked on Mott Street between Bleeker and Houston.

Mr. Todaro: I move to strike out all this testimony as to what happened on Friday, May 9th, or what he saw prior to May 9th. We are concerned with this indictment.

The Court: I will let it stand.

Mr. Todaro: Exception.

Q. And did you see Salvatore Benanti park this green Chervolet? A. I did. I saw him park the Chevy on May 10th between 12.30 and 1.00 a.m. in the morning. He parked

the Chevy on Mott Street between Houston and Bleeker. He got out. He locked the doors and he walked back to the Reno Bar.

Q. What did you do? A. I immediately went up to the car and tried to look inside of it.

Q. Did you see anything inside? A. Well, all I could see was cardboard in the back of the car. That is all.

Q. Did you look at the back seat of the car. A. Yes, I did.

(10) Q. And you could see a cardboard? A. I could see a cardboard where a seat should have been.

Q. There was no seat? A. No, sir.

Q. Could you describe the size of the cardboard? A. It appeared to me like—

Mr. Todaro: Objected to, what it appeared.

The Court: I will let it stand.

The Witness: It looked like a Kellog carton in which you pack large boxes of cornflakes, not flattened out, and placed in the rear seat where the regular seat would be.

Q. Do you know Salvatore Benanti? Can you recognize him? A. Yes, sir.

Q. Is he in the courtroom today? A. Yes, sir.

Q. Would you point him out? A. He is sitting right there by the attorney (indicating).

Q. And that is the man you saw on the date you have described? A. Yes, sir.

(11) Mr. Todaro: I move to strike out this testimony as not having any bearing to this indictment.

The Court: I will let it stand.

Q. Mr. Francis, you say you saw Salvatore Benanti later that evening in the Reno Bar? A. Yes, sir.

Q. Would you describe what you saw him do that night? A. After he went back into the bar, he did stay in the bar and then he did come out and stand in front of the door of the bar. In other words, he would go in and out of the bar on different occasions.

Q. Did he ever go back to the car? A. No, I did not see him go back to the car.

Q. Did he ultimately go home? A. Yes, he went back to his house that night.

Q. About what time was that? A. I would say between 3 and 3.30 that morning of May 10th.

Q. Did you see him again the next day? A. Yes, sir, I saw him between 5 and 6.

Q. Where was that? (12) A. He was in the vicinity and in the Reno Bar, and he came out of the Reno Bar, and I saw him walk up to Spring Street along Elizabeth and engage in conversation with a male.

Q. Do you know who that person was? A. At the time, no, but now I do.

Q. Do you know who he is today? A. It is his brother, Angleo Benanti, and they had a short conversation on the corner of Spring and Elizabeth, and Salvatore Benanti returned to the Reno Bar.

Q. What was the time of that conversation? A. I didn't have a watch.

Q. Approximately? A. I would say it was between 5 and 6 p.m. in the evening. It was summertime, so it was light.

Q. Are we talking about May 10, 1956? A. Yes, sir.

Q. And you say you went to the Reno Bar about what time? A. I didn't go there, but I saw him in the vicinity of the Reno Bar between 5 and 6 that evening.

Q. And you saw Angelo speak to him somewhat (13) later than that? A. Yes. May I clarify that again?

Between 5 and 6, I did see Angelo leave the vicinity of the

Reno Bar and walk to Elizabeth Street, and thereupon he did speak to his brother, Angelo.

Q. You said Angelo Twice. A. I saw Salvatore leave and speak to his brother Aneglo. Then he returned to the Reno Bar.

Q. Did you leave the vicinity at that point? A. No, sir.

Q. When did you leave the vicinity? A. I left the vicinity when the car in which I was had a radio message. It stated that Unit 1—

Mr. Todaro: I object to this conversation and message.

The Court: I will exclude the message. You got a message on your car.

Q. You drove off in the car? A. I did not, but Detective Sidney Sheppard did.

Q. And you were in that car? A. Yes.

(14) Mr. Kantor: No further questions.

Cross Examination by Mr. Todaro:

Q. Officer, you were in the vicinity of this Reno Bar quite frequently? A. Yes, sir.

Q. Did the Police Department have a tap on the Reno Bar, if you know? A. Yes, they have several taps on the Reno Bar.

Q. Did you obtain any information as part of this investigation from the wiretap conversation? A. Did I obtain any information in regard—

Q. Yes, in reference to the Benantis. A. Benanti?

Q. Yes. A. Yes.

Mr. Kantor: Could you make that a little more specific?

Mr. Todaro: The answer is yes.

Q. You also obtained information as a result of this wiretap that this car was going to be driven to a certain location? A. Yes.

Q. And that is how you apprehended the car when it reached its destination. Is that correct? (15) A. No—

Mr. Kantor: I object to that, your Honor.

The Court: Objection sustained.

Q. But you had obtained some information through the wiretap which gave you a lead to this trap? A. Part of the information.

Mr. Kantor: That is all, officer.

Redirect Examination by Mr. Kantor:

Q. Detective Francis, this wiretap that you speak of, was this authorized? A. Yes, sir.

Q. Could you describe the authorization? A. No, I couldn't, but I can—.

Q. It was an authorized wiretap? A. It was authorized by a Judge in New York State.

Q. Judge of the Supreme Court, State of New York? A. Yes, sir.

Mr. Kantor: That is all.

(Witness excused.)

* * * * *

(16) JOHN C. MACAULEY, called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Kantor:

Q. Detective Macauley, may I direct your attention to May 10, 1956.

Where were you at approximately 12 noon or 1.00 o'clock on that day? A. I was in the vicinity of Elizabeth Street and Kenmare Street.

Q. Had you had a conversation with anyone before you went there? A. Yes, sir, I had a conversation with my partner, Detective John Francis.

Q. When you went to this location, what did you find? A. We were keeping a premises under observation at that time. I saw the defendant standing in front of the premises.

Q. What was that premises? A. That is the Reno Bar and Grill.

Q. Did you go anywhere else in the area at that time? A. Later in the day I did, yes, sir.

(17) Q. Where did you go? A. I went to the vicinity of Mott Street and Bleeker.

Q. What did you see there? A. I saw a vehicle parked there.

Q. Could you describe that vehicle? A. Yes, sir, it is a light green Chevy coupe, license No. KA-3881 New York.

Q. Do you remember the year approximately? Was it a new car? A. No, it wasn't. It was a 1948 I believe.

Q. Did you observe this Chevrolet for a period of time? A. Yes, I did.

Q. Did anyone enter it? A. Yes, sir.

Q. Who entered it? A. A person now known to me as Angelo Benanti.

Q. About what time did you see him enter the car? A. Somewhere between the hours of 6 and 7 p.m.

Q. What did he do? A. He got into the car and drove off.

Q. What did you do? (18) A. I followed him.

Q. Where did you follow him to? A. We followed him to the East River Drive, up the East River Drive to 125th Street, crosstown to Lenox Avenue. It went up Lenox Avenue to 136th Street, and at 136th Street between Lenox and Fifth, I stopped the car.

Q. What happened? A. I identified myself as a police officer and opened the door, and told Angelo Benanti to get out.

Q. Did you examine the contents of the car?

Mr. Todaro: I object to all this testimony as not binding upon this defendant in this indictment, and I move to strike it out.

The Court: I will let it stand. We can pass, of course, on connection later.

Q. Did you examine the contents of the car at that time? A. I did.

Q. What did you find? A. There were 11 five-gallon cans containing alcohol.

Mr. Todaro: I move to strike it out, if (19) your Honor pleases.

The Court: I will let it stand.

Mr. Todaro: Exception.

Q. Did you notice anything else about the car or its contents? A. No. The rear seat was missing from the car.

Q. How about the contents of the car? Did you see any tax stamps? A. No, I did not.

Q. Did you smell anything? A. I smelled alcohol, yes, sir.

Q. Did you take Angelo Benanti back to the precinct house at this time? A. Not immediately, no, sir.

Q. What did you do? A. I questioned him on the scene.

Mr. Todaro: I object to all that passed between Angelo Benanti and this officer.

Mr. Kantor: I will move on, your Honor.

The Court: All right, I will let this stand.

Q. Did you ultimately bring Angelo Benanti to the precinct? A. I did.

(20) Q. And did you book him? A. Yes, sir, we did.

Q. Do you know anything about wiretapping on this case? A. Yes, sir.

Q. Could you answer either yes or no as to whether the wiretapping had anything to do with alcohol or unpaid tax alcohol?

Mr. Todaro: I object to the form of the question as leading and suggests of an answer.

The Court: I don't think it is suggestive, but I will sustain your objection as to form.

In other words, you want a general question, Mr. Todaro?

Mr. Todaro: Yes, sir.

The Court: All right, ask him in general terms.

Mr. Kantor: May I approach the bench for a minute?

The Court: Yes.

(The following took place at the bench out of the hearing of the jury:)

The Court: The United States Attorney has just

stated to me that the reason for the narrow (21) limits of his question is that this is a narcotics case, and he did not want to embarrass the defendant.

Now, Mr. Todaro, if you still press your objection—

Mr. Todaro: The former officer testified that as a result of the wiretap, they followed the car.

The Court: If you ask a general question as to the particulars regarding the placing of this tap, you are going to get this information. If you don't object, I will direct the United States Attorney to proceed.

Mr. Todaro: I don't want to be prejudiced on the issue of my motion to suppress, on the ground that the information is obtained as the result of wiretap. Therefore, my motion to suppress will fall.

The Court: That is all right.

Mr. Todaro: It doesn't make any difference if it was narcotics. I don't think the mere fact that they were authorized to make a wiretap confers any greater power on them.

The Court: Is there any harm in his (22) asking the question in substantially the same form, whether these taps were placed on these premises in connection with this particular case or crime? Then he won't disclose what their true purpose was.

Mr. Todaro: The former officer Francis testified that the wiretap resulted in their following the car.

The Court: Yes.

Mr. Todaro: That was his testimony. Therefore, the wiretap unquestionably led to the obtaining of this alcohol and then my motion to suppress would go.

The Court: I understand you. He wants to develop that the tap was not initiated for the purpose of this case, and I see no harm in letting him do it.

Mr. Todaro: I see no harm. The end result is the same. The information was obtained by wiretap.

The Court: I will put the question myself.

(The following took place in open court in the hearing of the jury:)

(23) *By the Court:*

Q. Mr. Macauley, I think you can probably answer this yes or no.

Was any wiretap placed on these premises in connection with this particular case or this particular charge? A. No, there was not.

The Court: All right.

Mr. Kantor: I have no further questions of the witness.

Mr. Todaro: At this point, no questions.

Will your Honor instruct him to remain? I may have to recall him.

The Court: Can't you go ahead with your cross examination now?

Mr. Todaro: All right.

Cross Examination by Mr. Todaro:

Q. How long did you have that tap on that Reno Bar? A. I should say roughly about a month, a month and a half.

Q. And did you listen to many of the conversations that went on between Salvatore Benanti, Angelo Benanti and others on the tap? (24) A. Yes, sir.

Q. And you obtained certain information as a result of

these conversations through the telephone. Is that correct? A. Yes, sir.

Q. Did you have a tap on his private line? A. No, sir.

Q. But you listened to many conversations of Salvatore and Angelo Benanti with others. Is that correct? A. Yes, sir.

Q. When this particular incident took place that this car was driven, you had obtained some information before that, hadn't you, that this car was going to go somewhere? A. Yes, sir, we had.

Q. And that was through the wiretap. Is that correct? A. Yes, sir.

Mr. Todaro: That is all.

(Witness excused.)

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(25) CHARGE OF THE COURT

The Court: Mr. Foreman, ladies and gentlemen of the jury: Before I instruct you on the law in this case, I would like to thank you for the care with which you followed it. You don't judge the importance of a case by its length, by its complexity or by its simplicity. Any case that is brought on before this Court for trial is an important case, important to a lot of people, and it is very gratifying to me to have watched you and to see that you have paid such careful attention to it.

Now, I will tell you certain things that apply to all cases, and then I will tell you a little bit about the crime which is here charged, and then I will tell you about some of the rules of evidence which may help you in your deliberations.

The first thing we ought to get clear is the division of responsibility. As far as the facts of this case are concerned—what the witnesses said and whether you believe the witnesses (26) or not, whether what they said is important or not, what it all adds up to—those are all questions on which your conclusion is paramount. You are the judges of the facts, and if counsel said something inconsistent with your recollection of the facts, or if I say something inconsistent with your recollection of the facts, disregard it because it is an unintentional slip on the part of whoever said it.

In the course of my discussion of the law, I may refer to some bits of evidence as I recall it. I may be wrong. As I discuss this charge, I am thinking in terms of rules of law, and not primarily questions of fact, and if I say something inconsistent with your recollection, disregard what I say and follow your own recollection.

I would like to again tell you what I told you when you first sat in the jury box—that an indictment is simply a charge that asks you a question whether or not something is true. This indictment in itself is no proof of guilt. It merely raises this question for investigation and for trial.

(27) The defendant has pleaded not guilty. He says it is wrong; it did not happen. That puts the issue before you to be decided.

Now, under the law, persons charged with the commission of crime are presumed to be innocent until their guilt has been established beyond a reasonable doubt. A defendant is not bound to prove that he did not commit the crime; rather, the Government must prove beyond a reasonable doubt that he did commit it, and only the legal evidence presented before you may be considered in this respect.

Now, what is a reasonable doubt? A reasonable doubt means a doubt founded upon a reason. It does not mean

a fanciful doubt or a whimsical or a capricious doubt, for anything relating to human affairs and depending upon human testimony is open to some possible or imaginary doubt. If you did not see something happen yourself, you listen to somebody else tell you what happened and you can always conjure up some imaginary doubt or some fanciful doubt if you want to. But the doubt which would control here is a reasonable doubt. In other words, (28) a doubt for which you give a reason as distinguished from a doubt for which you cannot give a reason.

When all of the evidence in the case, carefully scrutinized, compared and weighed by you, produces in your mind a conviction or belief of a defendant's guilt, such a conviction as you would be willing to act upon in matters of the highest importance relating to your own affairs, if it leaves your mind in a condition where you find an abiding conviction as to the truth of the charge, then you could be said to be free from a reasonable doubt. You would be convinced beyond a reasonable doubt.

Putting it another way, absolute, mathematical certainty is not required, but there must be such certainty as satisfies your reason and judgment, such that you feel conscientiously bound to act upon.

Now we come down to the charge in question. The grand jury charges that on or about the 10th day of May 1956 in the Southern District of New York, Salvatore Benanti, the defendant, unlawfully, wilfully and knowingly possessed a quantity of distilled spirits, the (29) immediate containers thereof not having affixed thereto, in such manner as to be broken on opening the container, stamps evidencing the tax or indicating compliance with the provisions of Title 26.

As I told you when you were selected as jurors, there is a tax upon distilled spirits, and the mechanics for enforcing that tax require the imposition of a stamp on any

container of distilled spirits in such a way that if you take the cork out or the stopper off, you will break the stamp. Those of you who have ever had relations with distilled spirits will know if you open a bottle of whiskey, you have to break a stamp to do it.

This was a different kind of container and perhaps a different kind of stamp, but the principle is the same. The law provides that no person shall transport, possess, buy, sell or transfer any distilled spirits unless the immediate container thereof has affixed thereto, in such manner as to be broken on opening the container, a stamp evidencing the tax or indicating compliance with the provisions of this chapter.

(30) Now, there are certain exceptions to the law. For example, if you are going to consume the spirits on the premises, that would be an exception. Spirits in bond is another exception. If it is in a reclassifying plant, that is another thing; Or if it is distilled spirits which are not going to be sold, that is an exception. In other words, if you had for some reason distilled something on your own premises which you were going to drink, you would not have to pay a tax on it, but if it is distilled spirits which are going to be sold, why, then you need this stamp.

The first charge is that this defendant possessed distilled spirits in containers without the required stamp. The second charge is that on the same night he transported it.

To find violation of this law then, you would have to find that there were distilled spirits in this car, that the stuff in this car was distilled spirits as the Department chemist is stipulated to have testified; that they did not have stamps on the containers; that they were being transported or possessed for the purposes of sale. Those are the elements of (31) the crime.

In the commission of a crime, it is not necessary that

the person charged perform all of the elements. Sometimes he can get someone to do it for him. The testimony here is that as far as the transportation is concerned, on this particular night, as I recall it—and your recollection should control—the defendant Salvatore did not drive the car, but that his brother Angelo drove it. The Government contends, however, that Angelo did this as agent for Salvatore, as Salvatore's accessory, so to speak.

If you are convinced beyond a reasonable doubt that that is true—that Salvatore knew there were distilled spirits in this car, that they were not stamped and that they were to be sold, and he directed Angelo to do that for him, to transport it and collect for the sale—why then, you may return a verdict of guilty.

On the other hand, if you have a reasonable doubt as to any of the elements of this crime, why, your verdict would be not guilty.

Now, the question of whether a person knows something or not you find in many crimes. You have (32) to decide: Did somebody know something? In this case you have to decide: Did Salvatore know that this alcohol did not have tax stamps on it? And in considering what a person knows or does not know, you may consider the way in which the transaction was carried out or what they said, and you may take into account the fact that the automobile was registered under a different name for which there was no proof of ownership. But to take that into account, you must be convinced beyond a reasonable doubt that the defendant knew it. In other words, you must measure what he did in the light of what you believe he knew. At the same time, you conclude what he knew by what he did and what he said.

In so far as the witness Angelo Benanti is concerned, I will charge you that in this case he must be regarded as an accomplice. In other words, you must listen to his tes-

timony and appraise it as you would a person who was a party in the alleged crime.

That is the great purpose of a jury. It is the sort of thing that you have to appraise in the light of your experience, and it is the sort of (33) thing where you have 12 people do it rather than the Judge alone because it is a matter of judgment. Now, you look at a witness. You have listened to his testimony and you decide whether it seems to be reasonable to you in the first place. Does it make sense? Does he seem to be a person who is bright enough to observe things and to relate them accurately?

You look at his demeanor. Did he testify frankly or did he testify as though he were withholding something from you?

You may take into account whether he would have any interest, for any reason, to lie, either to hurt the defendant or to help him, or to hurt himself or to help himself.

Then with respect to an accomplice, you look to see whether there is corroboration. In other words, are there other things in the case which are told to you by other witnesses which tend to corroborate what this witness said and therefore make it that much more likely that he was telling the truth? In this case, you have the testimony of the police officers as to what they saw happen with respect to this car, and you (34) have heard their testimony here this morning. I am not going to take the time now to repeat it for you.

Incidentally, if there is any testimony that you don't recall, you can always have it read back, but your recollection of it is what is going to control and not mine.

That is about what this case boils down to.

Mr. Benanti has said how he got into the car and what he was doing with it. Then the two police officers have testified as to seeing Salvatore in the car and in about the vicinity, and the locked condition of the car when they saw it.

You have heard the testimony and you sift it and appraise it all together, and you must decide whether you get the picture of the transaction and whether it convinces you beyond a reasonable doubt of the defendant's guilt.

As you probably all know, a jury in a criminal case, of course, must act by unanimous verdict. Each of you has an obligation to come to your own conclusion and to come to it earnestly and seriously. At the same time you each have an obligation to try to reach a unanimous verdict (35) if you can. In other words, you must never vote for a verdict you don't believe in yourself, but at the same time you should not be just stubborn and obstinate and refuse to discuss the matters with your fellow jurors because, as I have told you, you have been particularly attentive and just as each one of you has followed this testimony attentively, so have 11 other of your fellow jurors followed it carefully, and they have got their views just as you have yours.

Therefore, I suggest at the outset that you talk it over, that you be prepared to give reasons for your own view, and that you listen with just as much courtesy to the views of others as you would like to be listened to yourself.

Of course, you will reach your conclusion without sympathy or prejudice to either side. You are not confronted with the question of whether a person should be punished or whether he should not, or whether the law should be one way or whether it should be another. The questions of law and punishment and those things are for the Court and not for you.

Your job is to come back and report on (35a) the facts. You have been asked a question of fact: Did something happen? Under your duty, the only thing your oath calls upon you to do is come back and give the Court your honest opinion as to whether something happened or it did not.

If on all the facts you have a reasonable doubt as to this defendant's guilt, your verdict will be not guilty. If on all the facts, on the other hand, you are convinced beyond a reasonable doubt that he did commit these acts as he is charged with doing, your verdict should be guilty.

There are two counts. One is the possessing of the spirits and the other is the transporting of it, and you will render your verdict as to each count.

Are there any requests or exceptions?

Mr. Kantor: No.

Mr. Todaro: No.

(35b) New York, October 30, 1956; 10.30 o'clock a.m.

HERBERT C. KANTOR, Esq., and ARNOLD G. FRAIMAN, Esq., for the Government.

GEORGE J. TODARO, Esq., for the Defendant.

The Clerk: United States of America v. Salvatore Benanti. Gentlemen.

Mr. Todaro: Ready.

Mr. Kantor: Government is ready.

The Court: Do you want to say any more about your motion?

Mr. Todaro: If your Honor please, I think all that can be said we said. I find no case that does not sustain the position that in the Federal Courts evidence tainted by wiretapping is inadmissible. All the line goes along that way. The Federal Communications Act excludes no one.

The language is very emphatic. There cannot be any other determination than this evidence cannot be admitted (35c) in the Federal Court.

The Court: What do you say about the Weeks case?

Mr. Todaro: The Weeks case?

The Court: Yes. Even assuming you are right that the State officers violated the Federal statute, under the Weeks case would the evidence be admissible if there was no Federal complicity in the acts of the State officers?

Mr. Todaro: If your Honor please, the United States Supreme Court in Schwartz v. Texas, where that Communications Act was invoked on behalf of a person tried in the State Court, that was decided by the Supreme Court by a divided court and they held that the State had the right to use that evidence in the State Court but they did also say:

"We hold that Section 605 . . ."

This is the Supreme Court . . . "applies only to the exclusion in the Federal Court proceedings of evidence obtained and sought to be divulged in violation thereof. It does not exclude such evidence in State Court proceedings."

If we note the language, it says, "We hold (35d) that Section 605 applies only to the exclusion in Federal Court proceedings."

Now, there was a dissenting opinion there. Some of the judges felt that that exclusion should apply even to State Courts, and here we have an act of Congress which is the supreme law of the land, it supersedes the State laws. Congress said:

"No person shall"—

And that excludes no one, your Honor. And in a Federal Court, as stated in the Nardone case which I cite on page 3 of my brief it says, as the Supreme Court interprets the

act, it requires the exclusion not only of the wrongfully intercepted conversation but also of the evidence obtained by its use since such evidence is a fruit of the poisonous tree. That is the Supreme Court in the Nardone case.

That applied to intrastate as well as interstate communication as decided by the Weiss v. United States case.

I cannot see any other choice in the matter, your Honor, than that this evidence should be suppressed. And on the point you say the Federal officer did not in any way participate in (35e) this, I say they did. You take the United States chemist. He made the analysis on behalf of the United States Government, and it is exactly that testimony which I objected to.

The Court: But the Federal officers did not participate in the tap in any way. They did not even know about it.

Mr. Todaro: But here the State officer brought the fruit of the poisonous tree to the Government official and they had it analyzed and the Government sought to have that evidence introduced. While I conceded he would have so testified, I objected to the testimony on this ground.

The Court: Mr. Kantor, do you want to add anything to what you have in your brief?

Mr. Kantor: Your Honor, I think the Government's brief presents its case fairly fully. Solely in answer to what has been said in court today, the Government agrees that the Communications Act applies only to Federal Courts as suggested by Mr. Todaro. It also agrees that the Fourth Amendment applies only to Federal Courts. However, this does not say that it applies in every situation (35f) in a Federal Court, just that the Fourth Amendment does not apply to every situation in a Federal Court as to the admissibility of evidence, the conclusion being that in a Federal Court, in a situation such as we have before us today, the evidence would be admissible in a Federal Court.

Mr. Todaro: Justice Palmieri recently decided the Costello case where they sought to take his citizenship way, and there was wiretapped information obtained by the official who testified—

The Court: By the Federal officer?

Mr. Todaro: There they held that it was not admissible. I haven't found one case that holds otherwise, your Honor.

The Court: Is there any evidence here that any of the conversations overheard were those of the defendant?

Mr. Todaro: Sure, your Honor. The State officer testified in answer to my cross-examination. Your Honor may recall I asked him:

"Did you intercept a telephone communication?"

He said, "Yes."

"And did you hear the defendant converse (35g) with some other person?"

"And as a result of that conversation did you follow the car?"

The Court: There is no doubt about that, is there?

Mr. Kantor: To eliminate any doubt whatever, Salvatore Benanti was on one end of the phone conversation.

The Court: That is what I thought.

Well, I am going to deny defendant's motion. I think that the Weeks* case would apply even if there were no State statute which the State officers were following but where the action of the State officers was authorized by a State statute, I think there is all the more reason why we should follow the rule of the Weeks case in this particular matter. (See People v. Feld, 305 N. Y. 322, 329.) So I will deny the defendant's motion.

Now we come to the question of sentence, Mr. Todaro. Would you like to speak on that?

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*Weeks v. U. S., 232 U. S. 383; See also In re Milburne, 77 F2 310, 311.

Motion to Set Aside Verdict—Denied

Mr. Todaro: I also would like to move to set aside the verdict, if your Honor please, upon a further ground, that when I came into this case I urged upon your Honor to adjourn the matter (35h) as I was unfamiliar with the matter. As a matter of fact, your Honor knows I wasn't paid, I had only discussed the question of a fee, I had not discussed the matter of the evidence, and at the trial I even had to borrow a piece of paper from my adversary to proceed with the trial. I absolutely had no knowledge of the facts.

That I also urge as a reason for setting aside the verdict,

The Court: Except for the fact that you may have borrowed a piece of paper, I saw no evidence of lack of preparation. You seemed to follow whatever points there were to be made in the case and particularly moved in on the wiretap, which I don't think the prosecutor knew about. Anyhow, if you worked in this case without preparation, you did it well.

Mr. Todaro: Thank you.

The Court: So I will deny your motion.

Mr. Todaro: In so far as sentence, your Honor, the defendant is married, has a family and the violation alleged is that there were 11 cans of alcohol involved. I think that under the circumstances, your Honor, to temper justice with (35i) mercy, I don't think this is the type of matter—the defendant hasn't got much of a record—I don't think he has any record.

The Court: He has petty larceny.

Mr. Todaro: He has a wife and children, your Honor, and I don't think they should be punished. That is about all.

The Court: What do you have to say, Mr. Kantor?

Mr. Kantor: Your Honor, I think the probation report is probably fairly complete. I would like to add information that is perhaps only known to me because of my posi-

tion in the case, and that would be as to the defendant's attitude when he was arraigned and his attitude during the course of the proceedings. He has been as uncooperative as it is possible for a defendant to be. He refused to speak to anyone. The only attitude that he manifested to anyone or at any place was absolute arrogance.

On the question of what the defendant is presently doing, the Government does have information and it believes that he is still active in similar acts to those that are charged in the indictment (35j) upon which he has been convicted.

The Court: That is this alcohol business?

Mr. Kantor: Yes.

The Court: Do you have any idea of the scale on which he is active?

Mr. Kantor: Your Honor, I wouldn't want to say too much on this. I think I can safely say, however, without giving up too much information, that it is a fairly large scale, that he is apparently in the same capacity we are talking about today, as he has been under the indictment as charged, where he is charged with running alcohol. He is doing approximately the same thing today.

The Court: Well, Mr. Benanti, I don't know how I can impress on you the seriousness of what you are doing. I feel that I cannot put you on probation. I think that you have probably gotten into this business by stupidity rather than any carefully thought out plan, and I think all that I can do is to take you out of it for a while and hope that you will realize that you were not smart in getting into it, that there are easier ways to make a living and make a better living.

(35k) I am going to impose a sentence of 18 months. I will say further—I will say it perfectly bluntly—that if you can learn your lesson faster and realize that you are being sensible if you help the Government instead of trying to get in conflict with it, while it is still within my

power to change the sentence I am perfectly willing to consider your application in that regard, but in the absence of any such manifestation I think 18 months is a necessary sentence in this case.

Mr. Todaro: Would your Honor fix bail pending appeal?

The Court: Yes. What bail is he on now?

Mr. Kantor: He is presently on $500 bail. I would like to recommend $2,000 pending appeal.

The Court: Do you think—

Mr. Kantor: In view of the fact he now stands as a man convicted by a jury I think that would be wise.

Mr. Todaro: The Government request is fair, I will say that, but the last time we had (351) the same discussion after the jury convicted this defendant I urged your Honor to continue him under the same bail. I said he is a family man, he has a wife and children. He is not going to run away. The purpose of bail is only to assure his reappearance. It is my humble belief that raising the bail will only mean a little more hardship, we will have to pay a bondsman more money.

The Court: Mr. Todaro, there is no inclination on my part to increase his hardship, but I do think that after I have imposed sentence I would be neglectful if I left bail at such a low amount. I will make it $2,000 as requested.

Mr. Todaro: Would your Honor give us until 4 o'clock to post that bond?

The Court: Yes, I will. Incidentally, the 18 months is on both counts to run concurrently.

Judgment and Commitment

(40)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

On the 30th day of October, 1956 came the attorney for the government and the defendant appeared in person by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly possessing and transporting a quantity of distilled spirits, the immediate containers thereof not having affixed thereon stamps evidencing payment of the tax. (Title 26, Secs. 5008(b) (1) and 5642 USC). as charged in counts one and two and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the attorney general or his authorized representative for imprisonment for a period of Eighteen (18) months on each of counts one and two to run concurrently. Bail fixed at $2000. pending the appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

WALSH
United States District Judge

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No. 1131

IN THE

Supreme Court of the United States

October Term, 1957

SALVATORE BENANTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE J. TODARO,
Counsel for Petitioner.
135 Broadway,
New York, New York.

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IN THE

Supreme Court of the United States

October Term, 1957

No.

SALVATORE BENANTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming his conviction for violation of 26 U. S. C. §§5008 (b)(1) and 5642.

Opinion Below

The opinion of the Court of Appeals (App. A) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 6, 1957 (App. B). A petition for rehearing was denied on June 4, 1957 (App. C). The jurisdiction of this Court is invoked under 28 U. S. C. §1254.

Question Presented

Whether evidence secured through wiretapping by state officers is admissible in a federal court.

Statute Involved

Act of June 19, 1934, c. 652, §605, 48 Stat. 1103, 47 U. S. C. §605:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving

any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

Statement

An indictment in two counts was returned against petitioner in the United States District Court for the Southern District of New York on August 3, 1956 (R. 3)* The first count of this indictment charged possession of alcohol without tax stamps affixed and the second count charged transportation of such alcohol, in violation of 26 U. S. C. §§5008 (b)(1) and 5642.

The facts in this case are not in dispute and are fully set forth in the opinion of the court below. Petitioner and his brother frequented the Reno Bar in New York City (R. 8). The New York City police, believing that the Benantis were violating the state narcotics laws, obtained

* "R." refers to the appendix filed by petitioner in the court below.

a warrant authorizing them to tap the telephone of the Reno Bar (R. 12).

The police intercepted numerous conversations in which the Benantis were participants (R. 17-18). On May 10, 1956, they intercepted a conversation between petitioner and some other person, during the course of which it was stated that "eleven pieces" would be transported that night at a certain time and place (R. 14). Acting pursuant to this information, the police stopped and searched a car driven by petitioner's brother. Instead of narcotics they discovered eleven five gallon cans of alcohol without the tax stamps required by federal law (R. 14). They notified the Federal Alcohol and Tobacco Tax Division of the Treasury Department and this prosecution followed.

Concededly all of the evidence introduced against petitioner stemmed from the intercepted conversation. The trial judge denied petitioner's motion to suppress on the ground that no federal officer had participated in the interception, relying upon the case of *Weeks* v. *United States*, 232 U. S. 383, and on the further ground that the action of the state officers was authorized by state law (R. 28). The jury returned a verdict of guilty under both counts and petitioner was sentenced to imprisonment for eighteen months under each count, the sentences to run concurrently (R. 30).

The Court of Appeals stated that this case was "important and we think of first impression". It held that New York could not legalize what Congress had prohibited, and hence that the state officers violated §605 of the Federal Communications Act despite the fact that their action was authorized by state law. It went on to affirm peti-

tioner's conviction, however, on the ground that the same principle applies to evidence secured by wiretapping as to evidence secured by illegal search and seizure, namely, that the evidence is admissible so long as no federal officer participated in its illicit acquisition.

Reasons for Granting the Writ

Opinions in this Court have repeatedly reflected an awareness of the dangers implicit in prosecutions based on wiretapping. Those dangers appear in a new context here.

As recognized by the court below, this case presents an important and far reaching question in the field of federal criminal law which has never been resolved by this Court. Moreover, the holding of the court below is in square conflict with the views expressed by the Seventh and Tenth Circuits on this question.

1. This Court has frequently considered the admissibility of evidence secured by illegal search and seizure. It is now settled that the fruit of an illegal search and seizure by federal officers is inadmissible in a federal court. *Weeks* v. *United States*, 232 U. S. 383. It has likewise been held that the fruit of an illegal search and seizure by state officers is admissible in both state and federal courts. *Wolf* v. *Colorado*, 338 U. S. 25; *Lustig* v. *United States*, 338 U. S. 74; *Weeks* v. *United States, supra.* The reason for this distinction is very simple. The exclusionary rule enunciated in *Weeks* is applicable only to evidence secured in violation of the Fourth Amendment, and the Fourth Amendment applies only to action by federal officers.

This Court has held that the fruit of wiretapping by federal officers is inadmissible in the federal courts. *Nardone* v. *United States*, 302 U. S. 379, 308 U. S. 338. On the other hand, it has held that the fruit of wiretapping by state officers is admissible in a state court. *Schwartz* v. *Texas*, 344 U. S. 199. The opinion of Mr. Justice Minton in the *Schwartz* case clearly suggests that evidence secured through wiretapping by state officers is inadmissible in the federal courts. Referring to telephone calls intercepted by state officers, this opinion states, 344 U. S. at 201:

> "*Although the intercepted calls would be inadmissible in a federal court*, it does not follow that such evidence is inadmissible in a state court. Indeed, evidence obtained by a state officer by means which would constitute an unlawful search and seizure under the Fourth Amendment to the Federal Constitution is nonetheless admissible in a state court, *Wolf* v. *Colorado*, 338 U. S. 25, while such evidence, if obtained by a federal officer, would be clearly inadmissible in a federal court. *Weeks* v. *United States*, 232 U. S. 383." (Emphasis added.)

Neither the *Schwartz* case nor any other case decided by this Court, however, squarely decides whether evidence secured through wiretapping by state officers is admissible in the federal courts. As recognized by the court below, the search and seizure cases "touch the issue closely, but they do not decide it, for they did not deal with the statute before us". Unlike the Fourth Amendment, which applies only to action by federal officers, §605 of the Federal Communications Act applies to interception by *any person*. The court below was compelled to concede that this statute interdicts interception by state officers as well as others.

Evidence obtained through wiretapping by state officers, therefore, is obtained in plain contravention of a federal statute which prescribes a rule of evidence for the federal courts. The two situations hence present distinct legal problems.

The issue presented by this case is thus one of first impression and great importance. Concededly the use of wiretapping by state law enforcement officers is widespread. There is no way to determine the extent to which federal officers are making use of state wiretaps, but there is every reason to believe that such use is also widespread.

2. The decision of the court below is in conflict with the views expressed on this issue by the Seventh and Tenth Circuits. Both of these circuits have held that listening to a conversation on an extension telephone with the consent of one party does not amount to "interception" within the meaning of the statute. *Rathbun* v. *United States*, 236 F. 2d 514, certiorari granted, 352 U. S. 965; *United States* v. *White*, 228 F. 2d 832; see also *United States* v. *Bookie*, 229 F. 2d 130. In all of these cases, *state officers alone* listened to the conversations in question. And in all of these cases the courts made it clear that the evidence should have been excluded if the conduct of the officers amounted to "interception."

The truly disturbing feature of the decision of the court below is that the federal courts will now be continually plagued with wiretapping cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

GEORGE J. TODARO,
Counsel for Petitioner
Office and P. O. Address
135 Broadway
New York 6, N. Y.

July, 1957.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 266—October Term, 1956.

(Argued March 7, 1957 Decided May 6, 1957.)

Docket No. 24427

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

SALVATORE BENANTI,

Defendant-Appellant.

Before:

MEDINA and WATERMAN, *Circuit Judges*, and GALSTON, *District Judge*.

Appeal from a judgment of the United States District Court for the Southern District of New York, Lawrence E. Walsh, *Judge*.

Defendant appeals from a judgment of conviction of unlawful possession and transportation of eleven five-gallon cans of alcohol without tax stamps affixed thereto, in violation of 28 U. S. C. Sections 5008(b)(1), 5642. Affirmed.

Appendix A

PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, New York City (John E. Roeder, Executive Assistant United States Attorney, and Maurice N. Nessen, Assistant United States Attorney, New York City, of Counsel), *for plaintiff-appellee.*

GEORGE J. TODARO, New York City, *for defendant-appellant.*

MEDINA, *Circuit Judge*:

Salvatore Benanti appeals from a judgment of conviction of illegal possession and transportation of distilled spirits without tax stamps affixed thereto, in violation of 28 U.S.C. Sections 5008(b)(1), 5642. The case is important and we think of first impression, as we are called upon to formulate a rule to govern the admissibility in a federal court of evidence obtained by state officers in violation of Section 605 of the Federal Communications Act, 47 U. S. C. Section 605, which prohibits any person "not being authorized by the sender" from divulging a communication intercepted by a wiretap. The search-and-seizure cases hereinafter discussed touch the issue closely, but they do not decide it, for they did not deal with the statute before us.

Appellant and his brother, Angelo Benanti, frequented the Reno Bar, on Elizabeth Street in New York City, and the two brothers made telephone calls from the Reno Bar. The New York City police, believing that one or both of

the Benantis were dealing in narcotics in violation of state law, obtained a warrant, in accordance with New York law, New York Const., Art. 1, §12; N. Y. Criminal Code §813-a, from the Supreme Court of the State of New York, authorizing them to tap the telephone of the Reno Bar.

On May 10, 1956, by listening in on a conversation over the telephone between appellant and some other person, the state police officers learned that "eleven pieces" would be transported that night at a certain time and place in New York City. Acting pursuant to this information, the police stopped a car driven by appellant's brother Angelo, but they found no narcotics. Instead, they discovered hidden in the car eleven five-gallon cans of alcohol without the tax stamps required by 26 U. S. C. Section 5642. The Federal Alcohol and Tobacco Tax Division of the Treasury Department was notified and this prosecution followed. It was not until the cross-examination of one of the police officers at the trial that the prosecutor or any of his assistants had any knowledge or suspicion of the fact that there had been a wiretap. It is clear beyond cavil that no federal officer participated in any way in the wiretap or even knowingly offered any evidence which was discovered as a result of the wiretap. But it is equally clear that but for the wiretap there would have been no basis for any prosecution whatever, as the apprehension of Angelo and seizure of the "eleven pieces" led to the discovery of appellant's participation in the violations of federal law for which he has been convicted; and the sequence of cause and effect is clear.

Accordingly, as soon as the wiretap was disclosed at the trial, counsel for appellant objected and in due course made

a proper and timely motion to suppress. The denial of this motion provides the major basis for this appeal.

Despite the warrant issued by the New York State court pursuant to New York law, we have no alternative other than to hold that by tapping the wires intercepting the communication made by appellant and divulging at the trial what they had overheard, the New York police officers violated the federal statute. *Nardone* v. *United States*, 302 U. S. 379, 308 U. S. 338; *Weiss* v. *United States*, 308 U. S. 321. Section 605 of 47 U. S. C. is too explicit to warrant any other inference,[1] and the *Weiss* case made its terms applicable to intrastate communications. The section provides:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *.

---

[1] The New York cases do no deal with this point; they concern only the admissibility in evidence in the New York courts of wiretap evidence. *People* v. *Saperstein*, 2 N. Y. 2d 210, —— N. E. 2d ——, cert. denied —— U. S. —— (April 29, 1957); *People* v. *Feld*, 305 N. Y. 312, 113 N. E. 2d 440; *People* v. *Tieri*, 300 N. Y. 569, 89 N. E. 2d 526; *People* v. *Stemmer*, 298 N. Y. 728; *Harlem Check Cashing Corp.* v. *Bell*, 296 N. Y. 15, 68 N. E. 2d 854. Thus, in *Saperstein* the New York Court of Appeals declared that its position had been fully vindicated by *Schwartz* v. *Texas*, 344 U. S. 199. The holding in that case was that, "Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged *in violation of* the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute." 344 U. S. at p. 202, emphasis added.

But it does not necessarily follow, as appellant assumes, that wiretap evidence is inadmissible. As was said in *Nardone* v. *United States*, 308 U. S. 338, at p. 340:

> Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land.

Appellant argues that the statute itself, as interpreted by the Supreme Court, prohibits the use of wiretap evidence. Although the language of the earlier decisions is consistent with this position, it is no longer a tenable one, for the Supreme Court has upheld convictions based on wiretap evidence in both state and federal courts. *Schwartz* v. *Texas*, 344 U. S. 199; *Goldstein* v. *United States*, 316 U. S. 114. Thus, it must be some other principle that requires the exclusion of wiretap evidence in those cases in which it is inadmissible.

It is not difficult to discover what that principle is; the Supreme Court has told us. In *Goldstein* v. *United States*, *supra*, the court said at p. 120:

> Although the unlawful interception of a telephone communication does not amount to a search or seizure prohibited by the Fourth Amendment [*Goldman* v. *United States*, 316 U. S. 129; *Olmstead* v. *United States*, 277 U. S. 438], we have applied the same policy in respect of the prohibitions of the Federal Communications Act * * *.

It becomes necessary for us, therefore, to ascertain the principle which governs the admissibility in a federal court

of evidence obtained by an unconstitutional search or seizure.

The leading case is *Weeks* v. *United States*, 232 U. S. 397, wherein the Supreme Court held that documents taken from the defendant's room by a United States Marshal without a warrant and not incident to a lawful arrest could not be introduced in evidence against him, because

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures * * * should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. [232 U. S. at p. 392.]

Subsequent cases have marked off the bounds of the doctrine, thereby illuminating the underlying principle. There is no rule that all evidence obtained by means of an unconstitutional search or seizure is inadmissible in a federal court. Thus, there is a requirement that the defendant, if his objection is to prevail, must have been a victim of the illegality. *Goldstein* v. *United States*, *supra*. Moreover, and more important for present purposes, it must appear that federal officers participated in the illegality or that the unlawful acts were done in their behalf. The cases so holding in the Court of Appeals are legion. E.g., *United States* v. *Moses*, 7 Cir., 234 F. 2d 124; *United States* v. *White*, 7 Cir., 228 F. 2d 832; *Jones* v. *United States*, 8 Cir., 217 F. 2d 381; *Fredericks* v. *United States*, 5 Cir., 208 F.

2d 712, *cert. denied* 347 U. S. 1019; *Serio* v. *United States*, 5 Cir., 203 F. 2d 576, *cert. denied* 346 U. S. 887; *Jaroshuk* v. *United States*, 9 Cir., 201 F. 2d 52; *Scotti* v. *United States*, 5 Cir., 193 F. 2d 644; *Symons* v. *United States*, 9 Cir., 178 F. 2d 615, *cert. denied* 339 U. S. 985; *Shelton* v. *United States*, D. C. Cir., 169 F. 2d 665, *cert. denied* 335 U. S. 834; *United States* v. *Diuguid*, 2 Cir., 146 F. 2d 848, *cert. denied* 325 U. S. 857; *Taylor* v. *Hudspeth*, 10 Cir., 113 F. 2d 825; *Rettich* v. *United States*, 1 Cir., 84 F. 2d 118; *In re Milburne*, 2 Cir., 77 F. 2d 310; *Gowling* v. *United States*, 6 Cir., 64 F. 2d 796; *Burkis* v. *United States*, 3 Cir., 60 F. 2d 452, *cert. denied* 287 U. S. 655; *Miller* v. *United States*, 3 Cir., 50 F. 2d 505, *cert. denied* 284 U. S. 651.

Although the Supreme Court has had many opportunities to upset this rule, it has not done so. On the contrary, in *Byars* v. *United States*, 273 U. S. 28, the Court said at p. 33:

> We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account. But the rule is otherwise when the federal government itself, through its agents acting as such, participates in the wrongful search or seizure.

Was this rule discarded or in effect superseded by the holding in *Wolf* v. *Colorado*, 338 U. S. 25, that the Fourteenth Amendment prohibited unlawful searches and seizures by state officials, a point which had not previously been authoritatively settled? We think clearly not. The issue was crucial, and dissenting Justices pointed out again

and again their view that only by ruling out evidence procured by an unconstitutional search and seizure in both state and federal courts could the constitutional prohibition, now applicable to the acts of state officials, be given vitality. But the rule requiring participation by federal officials as a basis for the exclusion of such evidence was again applied in *Lustig* v. *United States*, 338 U. S. 74, decided the same day as *Wolf* v. *Colorado*. And as recently as *Irvine* v. *California*, 347 U. S. 128, Mr. Justice Jackson, speaking for four Justices, said at p. 136, "Even this Court has not seen fit to exclude illegally seized evidence in federal cases unless a federal officer perpetrated the wrong." We have no alternative other than to take this to be the law today.

As remarked by Mr. Justice Frankfurter in the *Lustig* case, *supra*, at pp. 78-9: "The crux of the doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter."

The case of *Gambino* v. *United States*, 275 U. S. 310, deserves special mention. There no federal officer took part in the unconstitutional actions, but the evidence was excluded nevertheless, because the state police were acting solely to enforce federal law. The case highlights the principle applied by the federal courts in excluding evidence which has been obtained by unconstitutional methods. Clearly the purpose of the rule is to discourage such activities by overzealous law enforcement officers. It is thought that the federal courts by refusing to receive evidence ob-

tained in violation of the law of the land will cause persons seeking federal convictions to forego the use of such methods. See *Rea* v. *United States*, 350 U. S. 214, 56 Colum. L. Rev. 940. Of course, if an unconstitutional search or seizure was not undertaken in order to secure evidence to be used in a federal court, a rule of exclusion by such a court would serve no useful purpose, for the violation would have occurred in any event. Exclusion in such a case would merely needlessly hamper the enforcement of federal law. Hence, as we have seen, the federal courts do not exclude evidence of federal crimes incidentally obtained by state officers seeking to enforce state law, even though by methods violative of the Fourteenth Amendment, for, whatever we may think of the rule, it is now settled law that the Constitution does not render such evidence inadmissible in a state court. *Irvine* v. *California, supra; Schwartz* v. *Texas, supra; Wolf* v. *Colorado, supra.* Since, this being so, exclusion from a federal court would not deter such activities, the evidence is admissible.

We can find no tenable distinction in principle between the rule of policy governing the admissibility in federal courts of evidence illegally obtained by state officers through an unlawful search and seizure, without participation or collusion by federal officials, and the rule of policy which should govern the admissibility of evidence obtained by state officials under similar circumstances in violation of the federal statute against wiretapping. On the contrary, as Judge Learned Hand, speaking for this Court, observed in *United States* v. *Goldstein*, 2 Cir., 120 F. 2d 485, at p. 490, "it would be a curious result, if a violation of the

section were more sweepingly condemned than a violation of the Constitution." The Supreme Court in affirming, *Goldstein* v. *United States*, *supra*, pointed out the limited scope of the rule requiring the exclusion of unconstitutionally obtained evidence, and said, "We think no broader sanction should be imposed upon the Government in respect of violations of the Communications Act." 316 U. S. at p. 121. Apart from this authority, surely it cannot be that the violation of a federal statute calls forth implied sanctions more pervasive than those formulated by the Supreme Court to compel obedience to a constitutional mandate.

Appellant insists that the issue now before us has been decided in his favor in *Schwartz* v. *Texas*, *supra*, and he relies upon and misconstrues the following part of a sentence appearing at p. 203: "We hold that §605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof * * *." But the Court was only concerned in *Schwartz* v. *Texas* with the admissibility of such evidence in state court proceedings. The intercepted call in the case now before us would, we think, have been clearly not admissible if federal officers participated. To say that the rule of exclusion applies only to federal court proceedings is not to say that wiretap evidence given in violation of Section 605, will always and under all circumstances be excluded in every proceeding in a federal court. The question now before us was not passed upon in *Schwartz* v. *Texas;* nor do we find in Mr. Justice Minton's opinion the slightest hint that this question was given any consideration whatever.

Accordingly, we hold that Judge Walsh properly denied the motion to suppress.

The only other issue on this appeal is whether the trial judge abused his discretion in refusing to allow a continuance. There is no need to detail the facts. We are not persuaded that under the circumstances it was unreasonable to order the case to trial.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of May, one thousand nine hundred and fifty-seven.

Present:

HON. HAROLD R. MEDINA
HON. STERRY R. WATERMAN
Circuit Judges

HON. CLARENCE G. GALSTON
District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

SALVATORE BENANTI,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 4th day of June, one thousand nine hundred and fifty-seven.

Present:

HON. HAROLD R. MEDINA
HON. STERRY R. WATERMAN
Circuit Judges

HON. CLARENCE G. GALSTON
District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

SALVATORE BENANTI,
Defendant-Appellant.

A petition for rehearing and for a stay of mandate having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that the petition for rehearing be and it hereby is denied.

Appendix C

Further ordered that the application for a stay of the issuance of the mandate be and it hereby is granted.

A. DANIEL FUSARO
Clerk

No. 231

IN THE

Supreme Court of the United States

October Term, 1957

SALVATORE BENANTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

GEORGE J. TODARO,
135 Broadway,
New York, N. Y.,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 231

SALVATORE BENANTI,

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—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

The nature of the Government's opposition to review in this case suggests that an elaboration of petitioner's position may be of assistance to the Court.

I

To begin with, there is a plain conflict between the ruling below, now reported at 244 F. 2d 389, and the decisions of the Tenth Circuit in *Rathbun* v. *United States*, 236 F. 2d

514, certiorari granted, 352 U. S. 965 (No. 30, this Term), and of the Seventh Circuit in *United States* v. *White*, 228 F. 2d 832, and *United States* v. *Bookie*, 229 F. 2d 130.

In all four cases, state officers alone listened to the conversations in question. In the three cases cited, it is true, the precise issue was whether listening in on an extension telephone amounted to a violation of §605 of the Communications Act. If, as the court below held in the present case, an undoubted interception by state officers is admissible in a federal prosecution, then it would not have been necessary to consider whether the conduct involved in *Rathbun*, *White*, and *Bookie* constituted an interception; each case could have been disposed of on the assumption that it did, and thus the troublesome question of the precise limits of a forbidden interception could have been avoided. Compare *Goldman* v. *United States*, 316 U. S. 129 (detectaphone); *On Lee* v. *United States*, 343 U. S. 747 (walkie-talkie); *Sugden* v. *United States*, 226 F. 2d 281 (C. A. 9), affirmed *per curiam*, 351 U. S. 916 (FCC monitoring). Far from not reaching the question decided below in this case, the other circuits necessarily decided it, and decided it differently than did the court below.

There is, accordingly, an inescapable and essential conflict between the rationale of the present case and that of the three others—a conflict that does not disappear simply because the Government chooses to relegate its discussion thereof to a footnote (Br. Op. 10, n. 2). Difficult legal issues do not yield to such sweeping-under-the-rug technique.

II

The Government asserts (Br. Op. 7) that "Petitioner does ask this Court to develop a special rule for evidence flowing from wiretaps." But actually, the issue whether evidence illegally obtained because of wiretapping in violation of Communications Act §605 is admissible in a federal prosecution poses a question wholly different from the inquiry whether evidence that is illegally obtained because of an unreasonable search and seizure is similarly admissible.

To begin with, the Fourth Amendment, which alone is the basis for excluding from use in a federal prosecution evidence obtained as the fruit of an unreasonable search and seizure (*Weeks* v. *United States*, 232 U. S. 383), does not apply to the States. That the first eight amendments limit only the federal Government was first decided in *Barron* v. *Baltimore*, 7 Pet. 243. Repeated attempts to make the provisions of those amendments bind the States, on the theory that they are included in their entirety in the Fourteenth Amendment, have been rejected over the years (*Hurtado* v. *California*, 110 U. S. 516; *Twining* v. *New Jersey*, 211 U. S. 78; *Palko* v. *Connecticut*, 302 U. S. 319), the last rejection being fairly recent (*Adamson* v. *California*, 332 U. S. 46).

It is true that in *Wolf* v. *Colorado*, 338 U. S. 25, 27-28, the Court held that

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."

But this is far from saying either that the Fourth Amendment binds the States or that it is fully incorporated into the Fourteenth. To the contrary, as *Irvine* v. *California*, 347 U. S. 128 shortly thereafter demonstrated, the Fourteenth Amendment's protection against unreasonable searches and seizures on the part of state officers is markedly narrower than the Fourth's against similar conduct by federal officials. Plainly a federal conviction tainted as Irvine's was would not have passed constitutional scrutiny. Cf. *Kremen* v. *United States*, 353 U. S. 346.

Here, however, there is involved a statute of general application, whose meaning has become settled, not through the gradual process of inclusion or exclusion, but by a consideration of the plain meaning of its terms. The net of the decisions is simply this, that when Congress in §605 said "no person", it meant "no person". *Pardone* v. *United States*, 302 U. S. 379; *Nardone* v. *United States*, 308 U. S. 338; *Weiss* v. *United States*, 308 U. S. 321. Consequently, the question is not whether, as an original proposition, a violation of a statute is to be more sweepingly condemned than a violation of the Constitution (L. Hand, *J.*, in *United States* v. *Goldstein*, 120 F. 2d 485, 490 (C. A. 2), affirmed, 316 U. S. 114), it is rather whether the statute has a more comprehensive reach by its clear terms than constitutional provisions of limited (Fourth Amendment) and uncertain (Fourteenth Amendment) application.

It is significant in the present connection that every expression in the books up to now is contrary to the holding of the court below.

In *Schwartz* v. *Texas*, 344 U. S. 199, while holding that telephone conversations intercepted by state officers were

admissible in a state prosecution, the Court was at pains to note (p. 201) that "the intercepted calls would be inadmissible in a federal court." And in *DeVasto* v. *Hoyt*, 101 F. Supp. 908 (S. D. N. Y.) a three-judge district court, though denying the plaintiffs—defendants in a state prosecution—an injunction against the use in that prosecution of telephone conversations intercepted by state officials, said (p. 909), "It is undisputed that this evidence would be inadmissible in a federal criminal prosecution."

III

The Government argues (Br. Op. 8-9), that since the interception in the present case was made by state officers under state law, the applicable rule is that of *Lustig* v. *United States*, 338 U. S. 74, 78-79, namely, that "a search is a search by a Federal officer if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter."

But the basis of the foregoing, see *Byars* v. *United States*, 273 U. S. 28, 33-34, was that the Fourth Amendment does not apply to state officers, at least until they are enforcing federal law. *Gambino* v. *United States*, 275 U. S. 310. But, as has been shown, §605 states categorically that "no person" shall intercept and divulge telephone communications, and this command accordingly governs prosecutions in federal courts. Indeed, *Rea* v. *United States*, 350 U. S. 214, where federal officers were enjoined from using evidence illegally obtained by them by becoming witnesses in a subsequent state prosecution, strongly suggests that the area for legal use of illegally obtained evidence is—very properly—becoming ever smaller.

IV

It is argued (Br. Op. 9, n. 1) that in the present case the federal officers did not knowingly offer evidence discovered as a result of the wiretap. But this assumes that the admissibility of the evidence in question depends on the *scienter* of those offering it. No such concept has validity here. Guilty knowledge is material in criminal cases, where punishment of the actor is in issue. Here, however, the question is not whether the federal officers are to be punished for having made use of the wiretaps, it is whether petitioner may invoke that fact to vitiate his own conviction. See *Irvine* v. *California,* 347 U. S. 128, 136-138. Consequently, it makes no difference that the federal officers did not know the source of the poisonous evidence that they used.

The analogy here is that of evidence tainted by perjury, and the controlling precedent comes from the last Term. *Mesarosh* v. *United States,* 352 U. S. 1.

There a conviction was set aside because evidence duly adduced at a trial, without knowledge of its falsehood, was later found to be untrue. This Court held that no conviction based on such tainted testimony could be permitted to stand.

Surely there can be no difference between a conviction tainted by untruthful testimony, not known to be such when offered by the Government, and a conviction tainted by testimony obtained by violation of §605, not known to have been such when offered by the Government.

The question is therefore not whether the Government knew of the taint when the evidence was first adduced, it is

rather whether the Government knows of the taint now. Plainly it does.

V

Nearly a generation ago, Mr. Justice Brandeis predicted (dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 471, 473) that—

> "Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."

The rule of *Olmstead*—that wiretapping is not a violation of the constitutional prohibition against unreasonable searches and seizures—still stands, despite several subsequent opportunities to strike it down. See *Goldman* v. *United States*, 316 U. S. 129, 136; *On Lee* v. *United States*, 343 U. S. 747, 758, 762. But the immediate problem now is whether, despite the categorical prohibitions of §605, a federal conviction may stand where it is shown to rest on wiretapped evidence obtained by state officers. We submit that, before a federal conviction obtained by federal ratification of "such dirty business" is sustained—Holmes, *J.*, *Olmstead* v. *United States*, 277 U. S. 438, 469, 470—review by this Court should be had.

VI

The court below said (Pet. App. 2a; 244 F. 2d at 390), "The case is important." Petitioner agrees, and accordingly reiterates his contention that this Court should grant the writ of certiorari in the present cause, to the end that enforcement of federal law in a federal court shall not rest on the fruits of a disobedience of federal law.

Respectfully submitted,

GEORGE J. TODARO,
135 Broadway,
New York, N. Y.,
Counsel for Petitioner.

September 1957.

No. 231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

SALVATORE BENANTI, *Petitioner*,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONER

GEORGE J. TODARO
135 Broadway
New York, N. Y.

JACOB KOSSMAN
1325 Spruce Street
Philadelphia 7, Pa.

Counsel for the Petitioner

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IN THE

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No. 231

SALVATORE BENANTI, *Petitioner*,

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UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals is reported at 244 F. 2d 389.

JURISDICTION

The judgment of the Court of Appeals (R. 42)[1] was entered on May 6, 1957. A petition for rehearing was denied on June 4, 1957 (R. 48). The petition for a writ of certiorari was filed on June 28, 1957, and granted on October 8, 1957. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

[1] "R" refers to the record filed in connection with the petition for certiorari.

QUESTIONS PRESENTED

Whether evidence obtained through wiretapping by state officials is admissible in a federal criminal prosecution in a United States District Court.

STATUTE INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1103, 47 U. S. C. § 605, provides:

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof,

knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

STATEMENT

An indictment in two counts was returned against petitioner in the United States District Court for the Southern District of New York on August 3, 1956 (R. 3). The first count of this indictment charged possession of alcohol without tax stamps affixed and the second count charged transportation of such alcohol, in violation of 26 U. S. C. §§ 5008(b)(1) and 5642.

The facts in this case are not in dispute and are fully set forth in the opinion of the court below. Petitioner and his brother frequented the Reno Bar in New York City (R. 8). The New York City police, believing that the Benantis were violating the state narcotics laws, obtained a warrant authorizing them to tap the telephone of the Reno bar (R. 12).

The police intercepted numerous conversations in which the Benantis were participants (R. 17-18). On May 10, 1956, they intercepted a conversation between petitioner and some other person, during the course of which it was stated that "eleven pieces" would be transported that night at a certain time and place (R. 14). Acting pursuant to this information, the police stopped and searched a car driven by petitioner's

brother. Instead of narcotics they discovered eleven five gallon cans of alcohol without the tax stamps required by federal law (R. 14). They notified the Federal Alcohol and Tobacco Tax Division of the Treasury Department and this prosecution followed.

Concededly all of the evidence introduced against petitioner stemmed from the intercepted conversation. The trial judge denied petitioner's motion to suppress on the ground that no federal officer had participated in the interception, relying upon the case of *Weeks* v. *United States*, 232 U. S. 383, and on the further ground that the action of the state officers was authorized by state law (R. 28). The jury returned a verdict of guilty under both counts and petitioner was sentenced to imprisonment for eighteen months under each count, the sentences to run concurrently (R. 30).

The Court of Appeals said (244 F. 2d at 390) that "The case is important and we think of first impression." It held that New York could not legalize what Congress had prohibited, and hence that the state officers violated § 605 of the Federal Communications Act despite the fact that their action was taken in pursuance of state law. It went on to affirm petitioner's conviction, however, on the ground that evidence obtained by wiretapping is, like evidence obtained by illegal search and seizure, admissible in a federal prosecution as long as no federal officer participated in its illegal acquisition.

SUMMARY OF ARGUMENT

A. The intervention of state officers in an unlawful search and seizure differs completely from the participation of state officers in wiretapping, because of the difference in source and scope of the prohibitions involved.

Evidence obtained as the fruit of an unreasonable search and seizure is inadmissible in a federal prosecution because of the Fourth Amendment. The first eight amendments, it has been repeatedly and consistently held, do not bind the States. And although *Wolf* v. *Colorado*, 338 U. S. 25, did indeed hold that the Fourth Amendment is incorporated into the Fourteenth, *Irvine* v. *California*, 347 U. S. 128, shortly thereafter, demonstrated that the incorporation was not complete.

Here, however, there is no vague or uncertain command. The prohibitions of Section 605 apply to all communications, even those that are purely intrastate, *Weiss* v. *United States*, 308 U. S. 321, and they forbid not only intercepting the message but also divulging its existence, its substance, or its terms.

B. Accordingly, every expression in the books up to now, apart from the ruling now under review, is that the fruits of wiretapping are inadmissible in a federal prosecution in a federal court, and that was also said in *Schwartz* v. *Texas*, 344 U. S. 199, 201, where the contrary was held as to a state prosecution.

C. The search and seizure doctrine, that a search "is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter" (*Lustig* v. *United States*, 338 U. S. 74, 78-79), rests on the Fourth Amendment, and has no application to wiretapping in view of the specific prohibition of Section 605 against divulging the message or its substance. "To recite the contents of the message in testimony before a court is to divulge the message." *Nardone* v. *United States*, 302 U. S. 379, 382. Plainly, therefore, Section 605 applies to federal

court proceedings (*Schwartz* v. *Texas*, 344 U. S. 199, 203). The *status* of the person making the interception is accordingly immaterial.

D. The circumstance that the state officers here purported to act pursuant to a state statute cannot legalize what Congress has prohibited, as the court below properly held. The federal command controls, certainly as to what constitutes admissible evidence in a federal criminal proceeding. Rule 26, F. R. Crim. P.

E. The fact that the federal officers did not know of the tainted source of their evidence until the trial is immaterial. Their *scienter* would only be material if they were charged criminally under 47 U. S. C. § 501, for having participated in a violation of § 605. Here there is no question of punishing officers of the law, but only an issue of admissibility, and the only showing necessary is that divulging the fruits of the wiretapping would have violated § 605.

F. It is not necessary to reach the constitutional question considered in *Olmstead* v. *United States*, 277 U. S. 438, where Holmes, J., denounced as "dirty business" wiretapping by federal officers that involved a violation of state law. The present case rests on a statute, and involves even dirtier business, since by causing the fruits of an interception to be divulged in a federal court room, the federal officers violated federal law. Consequently, the very act of convicting petitioner for a violation of federal law necessarily involved the violation of another federal law.

ARGUMENT

EVIDENCE OBTAINED IN VIOLATION OF SECTION 605 OF THE FEDERAL COMMUNICATIONS ACT, BY ANY PERSON WHOMSOEVER, IS INADMISSIBLE IN A FEDERAL PROSECUTION IN A FEDERAL COURT.

The heart of the present case is that, by reason of the differing scope of the Fourth Amendment and Section 605 of the Federal Communications Act, the intervention of state officers in an unlawful search and seizure has one effect in a federal criminal prosecution, while their participation in wiretapping has a very different consequence in such a prosecution.

The Government's assertion (Br. Op. 7) that "Petitioner does ask this Court to develop a special rule for evidence flowing from wiretaps" blurs the true reasons why the two situations "present distinct legal problems" (Pet. 7).

A. A state officer participating in an illegal search and seizure does not violate federal law, whereas a state officer engaging in wiretapping does.

The basic error of the Government and the court below lies in the assumption that all evidence illegally obtained is to be treated on the same footing. This too facile equation overlooks a vital distinction.

The reason why the issue here, whether evidence illegally obtained because of wiretapping in violation of Communications Act § 605 is admissible in a federal prosecution, differs from the inquiry whether evidence illegally obtained because of an unreasonable search and seizure is there admissible, follows from the difference in source and scope of the prohibitions involved.

Evidence obtained as the fruit of an unreasonable search and seizure is—subject to a qualification fully discussed below—inadmissible in a federal prosecution

because of the Fourth Amendment's protection against unreasonable searches and seizures. *Weeks* v. *United States*, 232 U. S. 383. That Amendment by its own force limits all federal action. But the first eight Amendments, which were adopted to curb the powers of the newly created Federal Government, and whose adoption was indeed the price exacted for ratification of the Constitution, do not bind the States; that proposition was first established in *Barron* v. *Baltimore*, 7 Pet. 243, in an opinion written by Chief Justice Marshall, who had himself been a participant in the ratifying process as a member of the Virginia Convention. See 1 Beveridge, *The Life of John Marshall*, 364-480.

Repeated attempts to make the provisions of those amendments bind the States, on the theory that the first eight amendments were included in their entirety within the Fourteenth Amendment, have been consistently rejected by this Court. *Hurtado* v. *California*, 110 U. S. 516; *Twining* v. *New Jersey*, 211 U. S. 78; *Palko* v. *Connecticut*, 302 U. S. 319. The last rejection, where the issue was extensively explored, took place only ten years ago. *Adamson* v. *California*, 332 U. S. 46.

It is true that in *Wolf* v. *Colorado*, 338 U. S. 25, 27-28, the Court held that

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause."

But the *Wolf* case did not purport to overrule the settled line of cases, from *Barron* v. *Baltimore* through *Adamson* v. *California*, or the principle that the first

eight amendments did not limit the States *ex proprio vigore*. To the contrary, the Court said (338 U. S. at 26), "The issue is closed", and it affirmed a state conviction that rested upon evidence obtained by an illegal search.

Three propositions necesarily follow from *Wolf*.

First, the state officers who participated in the illegal search that turned up the evidence on which Wolf was convicted did not violate any federal law, using "law" in its broadest sense.

Second, the Fourth Amendment does not bind the States.

Third, the Fourth Amendment is not fully incorporated in the Fourteenth.

The proof of the third proposition came shortly thereafter, in *Irvine* v. *California*, 347 U. S. 128. There the Court affirmed a state conviction that rested in large measure on the defendant's incriminating statements, which had been obtained by state police officers who had surreptitiously entered defendant's home, and placed a microphone in a bedroom and a closet.

It could hardly be contended that a federal conviction thus tainted would have passed constitutional scrutiny. *Cf. Kremen* v. *United States*, 353 U. S. 346; *Johnson* v. *United States*, 333 U. S. 10; *McDonald* v. *United States*, 335 U. S. 451. Plainly, therefore, the Fourteenth Amendment's protection against unreasonable searches and seizures on the part of state officers is markedly narrower than the Fourth Amendment's protection against similar conduct by federal officers.

In the present case, however, the situation is wholly different. Here there is involved no vague federal

command, the meaning of which is unclear—or at least not accurately predictable—and whose eventual scope can only become settled through the gradual process of inclusion or exclusion.

The federal command in the case at bar is found in a statute of general application, which applies to all communications, even those that are purely intrastate. *Weiss* v. *United States*, 308 U. S. 321. The scope of that statute leaves no room for interpretation, and this Court has accordingly held that when Congress in Sec. 605 said that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person", it meant that "no person" should divulge an intercepted communication to "any person". *Nardone* v. *United States*, 302 U. S. 379; *Nardone* v. *United States*, 308 U. S. 338. And it is significant that, although repeated attempts have been made over the years to legalize wiretapping, even in a narrow class of cases and under careful safeguards, Congress has steadfastly refused to amend Section 605 in any way.[2]

Consequently, the question is not, as the court below and the Government here assume, whether all kinds of

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[2] Extensive citations to unsuccessful proposals to amend § 605 will be found in Brownell [Atty. Gen. of U. S.], *The Public Security and Wire Tapping*, 39 Corn. L. Q. 195; Rogers [Dep. Atty. Gen. of U. S.], *The Case for Wire Tapping*, 63 Yale L. J. 792; Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. of Pa. L. Rev. 157; Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 Col. L. Rev. 165. For proposals subsequent to the date of the latest of the foregoing articles, see Wiretapping, Hearings before Subcommittee No. 5, House Judiciary Committee, on H. R. 762 and related bills, 84th Cong., 1st sess.

evidence illegally obtained stand on the same footing with respect to admissibility in a federal criminal prosecution. Nor is the question whether, as an original proposition, a violation of a statute is to be more sweepingly condemned than a violation of the Constitution. *Cf.* L. Hand, J., in *United States* v. *Goldstein*, 120 F. 2d 485, 490 (C. A. 2), affirmed, 316 U. S. 114. Such generalized abstractions do not assist in the solution of the present very specific case. The question here is whether Section 605 has a more comprehensive reach by reason of its explicit terms than either the constitutional provisions contained in the Fourth Amendment, which has only a limited scope, or those contained in the Fourteenth Amendment, whose scope in this field is still uncertain.

In view of *Wolf* and *Irvine*, it cannot be said that every illegal search by a state officer offends against federal law. But the terms of Section 605 make it clear that every wiretapping by a state officer does. Accordingly, as we now will show, every expression in the books up to now is contrary to the holding under review.

B. Wiretapped evidence obtained by state officers and turned over to federal officers for use in a federal prosecution is inadmissible in a federal court.

We are dealing here with a federal prosecution in a federal court,[3] where the prohibition in question is that of the same sovereign who is prosecuting. Consequent-

[3] A different rule might perhaps follow in a state prosecution removed into a federal court under 28 U. S. C. §§ 1442, 1442a. *See Tennessee* v. *Davis*, 100 U. S. 257; *Carter* v. *Tennessee*, 18 F. 2d 850 (C. A. 6); *Miller* v. *Kentucky*, 40 F. 2d 820 (C. A. 6); *Maryland* v. *Chapman*, 191 F. Supp. 335 (D. Md.). But this is not such a case.

ly, the recent holding here, that telephone conversations intercepted by state officers were admissible in a state prosecution (*Schwartz* v. *Texas*, 344 U. S. 199), is not apposite.

Quite to the contrary, the Court in *Schwartz* was at pains to note (344 U. S. at 201) that "the intercepted calls would be inadmissible in a federal court."

Earlier, in *Upshaw* v. *United States*, 335 U. S. 410, 414, 427, four Justices had said.

> "The prohibition of wiretapping in § 605 of the Federal Communications Act, 47 U. S. C. § 605, is not the basis for the exclusion in prosecutions of evidence so obtained. The exclusion of such evidence is based on an explicit direction of the section that information so obtained should not be divulged."

Two Courts of Appeals have assumed and necessarily decided, contrary to the court below, that an undoubted interception by state officers alone would be inadmissible in a federal prosecution. *Rathbun* v. *United States*, 236 F. 2d 514 (C. A. 10), pending on writ of certiorari, No. 30, this Term; *United States* v. *White*, 228 F. 2d 832 (C. A. 7); *United States* v. *Bookie*, 229 F. 2d 130 (C. A. 7).

In those three cases, true enough, the precise issue was whether listening in on an extension telephone constituted a violation of Section 605. Plainly, if an undoubted interception by state officers is admissible in a federal prosecution, as the court below held here, then it would not have been necessary to inquire whether the conduct involved in *Rathbun*, *White*, and *Bookie* amounted to an interception. Each of those cases could then have been disposed of on the assump-

tion that it did, and thus the troublesome issue of the precise limits of a forbidden interception could have been avoided. Compare *Goldman* v. *United States*, 316 U. S. 129 (detectaphone); *On Lee* v. *United States*, 343 U. S. 747 (walkie-talkie); *Sugden* v. *United States*, 226 F. 2d 281 (C. A. 9), affirmed *per curiam*, 351 U. S. 916 (FCC monitoring). The Tenth and Seventh Circuits thus necessarily decided the question involved in the present case, and decided it differently than did the court below.

Finally, in *DeVasto* v. *Hoyt*, 101 F. Supp. 908 (S. D. N. Y.), a three-judge district court, although refusing the plaintiffs—defendants in a state prosecution—an injunction against the use in that prosecution of telephone conversations intercepted by state officials, said (p. 909), "It is undisputed that this evidence would be inadmissible in a federal criminal prosecution."

The foregoing impressive listing of authority—unanimous except for the holding now under review—is fully supported by a consideration of the statute's purpose. Congress has said that intercepted telephone conversations shall not be divulged to "any person". By what process of reasoning, then, does it become proper to disclose them to federal jurors in a United States court? Where the statute is thus plain, it should not be necessary to go further and to urge in addition the principle that enforcement of federal law in a federal court shall not rest on the fruits of a disobedience of federal law.

C. The terms of Section 605 of the Federal Communications Act render inapplicable the "silver platter" doctrine.

The Government argued (Br. Op. 8-9) that, since the interception in the present case was made by state officers under state law, the rule applicable is that of *Lustig* v. *United States*, 338 U. S. 74, 78-79, namely, that "a search is a search by a Federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter."

But that is the search and seizure rule, the basis of which, see *Byars* v. *United States*, 273 U. S. 28, 33-34, was that the Fourth Amendment does not apply to state officers, at least until they are enforcing federal law, in which event they are to be treated as federal officers. *Gambino* v. *United States*, 275 U. S. 310. (In the converse situation, however, where federal officers assist in enforcing state law, they are still under the restrictions attaching to their federal status; see *Rea* v. *United States*, 350 U. S. 214, where federal officers were enjoined from using, by becoming witnesses in a subsequent state prosecution, evidence illegally obtained by them in their federal status. Thus the area for the legal use of illegally obtained evidence is—very properly—becoming ever smaller.)

In the present case, however, the applicable prohibition is broader. Section 605 is specific where the Fourth Amendment—and, *a fortiori*, the Fourteenth—are only inferential. Not only is interception of messages prohibited by § 605, that provision likewise forbids divulging what has been intercepted. Thus, for purposes of a federal trial, it makes no difference by whom or under what circumstances the original interception took place.

This Court in the first *Nardone* case answered the question presently in issue (302 U. S. at 382):

> "We nevertheless face the fact that the plain words of § 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that "*no person*" shall divulge or publish the message or its substance to "*any person.*" To recite the contents of the message in testimony before a court is to divulge the message. * * *" (Italics in original.)

The underlying principle of § 605 was further elaborated in the second *Nardone* case (308 U. S. at 340-341):

> "We are here dealing with specific prohibition of particular methods in obtaining evidence. The result of the holding below is to reduce the scope of § 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve. Such a reading of § 605 would largely stultify the policy which compelled our decision in *Nardone v. United States* (302 U. S. 379), *supra*. That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, it outlawed because 'inconsistent with ethical standards and destructive of personal liberty.' 302 U. S. 379, 384. To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' What was said in a different context in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392, is pertinent here: 'The essence of a provision forbidding the acquisition of evidence in

> a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.' See *Gouled* v. *United States*, 255 U. S. 298, 307. A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose."

The nub of the present issue is that, as said in the first *Nardone* case, "To recite the contents of the message in testimony before a court is to divulge the message."

So far as proceedings in federal courts are concerned, that consideration is decisive, and *Schwartz* v. *Texas*, 344 U. S. 199, far from being to the contrary, actually supports the proposition. For as was there said (344 U. S. at 203),

> "We hold that § 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings. Since we do not believe that Congress intended to impose a rule of evidence on the state courts, we do not decide whether it has the power to do so."

Section 605 is simply too broad—and too explicit—to permit divulging, in any federal prosecution in a federal court, "the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *." In the face of this language, the *status* of the person making the interception is, obviously, entirely irrelevant to the prohibited divulging of what was intercepted.

D. The circumstance that the state officers here purported to act pursuant to a state statute cannot legalize what Congress has prohibited.

The Government argued (Br. Op. 9-10) that, since "the interception was done pursuant to a state warrant issued by authority of state law, with the kind of protection afforded by search warrants, * * * the evidence thus obtained should not be excluded by a federal court."

This argument was flatly rejected by the court below (244 F. 2d at 391):

> "Despite the warrant issued by the New York State court pursuant to New York law, we have no alternative other than to hold that by tapping the wires, intercepting the communication made by appellant and divulging at the trial what they had overheard, the New York police officers violated the federal statute. Nardone v. United States, 302 U. S. 379; Id., 308 U. S. 338; Weiss v. United States, 308 U. S. 321. Section 605 of 47 U. S. C. A. is too explicit to warrant any other inference, and the Weiss case made its terms applicable to intrastate communications."

Indeed, the Government's contentions based on state law lack even the doubtful merit of atmospheric trimming. It is not necessary here to determine whether Congress has occupied the field, so as to preclude the operation of state legislation not inconsistent with the Congressional enactment. *Cf. Pennsylvania* v. *Nelson*, 350 U. S. 497. Here the two provisions are squarely inconsistent; the federal statute—which applies to intrastate messages, *Weiss v. United States*, 308 U. S. 321—prohibits all interceptions, the state statute purports to legalize some of them. In those circumstances, plainly, the federal rule prevails. *E.g., Hill* v. *Florida*,

325 U. S. 538. It could not be otherwise, consistently with the Supremacy Clause. U. S. Const., Art. VI. And, whatever may be the rule in civil cases in the federal courts, see F. R. Civ. P., Rule 43(a), it is plain that state law is ineffective to vary rules of evidence that Congress has prescribed for the trial of federal criminal cases. F. R. Crim. P., Rule 26. That the Government should seriously suggest that state law can immunize the federal crime (47 U. S. C. § 501) on whose fruits the present conviction rests verges, we submit, on the amazing.

E. The circumstance that the federal officers did not know of the tainted source of their evidence until the trial is immaterial.

The Government argues (Br. Op. 9, n. 1), that in this case the federal officers did not knowingly offer evidence discovered as a result of the wiretap, quoting from the opinion below (244 F. 2d at 390):

> "It is clear beyond cavil that no federal officer participated in any way in the wiretap or even knowingly offered any evidence which was discovered as a result of the wire."[4]

But the Government's argument is patently unsound, essentially because it assumes that the admissibility of the evidence now in question depends in any degree upon the *scienter* of those who offer it. No such concept has validity here. Guilty knowledge is mate-

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[4] The sentence next following, not quoted by the Government, is as follows:

> "But it is equally clear that but for the wiretap there would have been no basis for any prosecution whatever, as the apprehension of Angelo and seizure of the 'eleven pieces' led to the discovery of appellant's participation in the violations of federal law for which he has been convicted; and the sequence of cause and effect is clear."

rial only in criminal cases, where the punishment of the actor is in issue. If the federal officers who prosecuted the present case had been charged with a violation of 47 U. S. C. § 501, then the circumstance that he had not "knowingly offered any evidence which was discovered as a result of the wiretap" (244 F. 2d at 390) would be material, relevant, and perhaps determinative. But the question here is very different. It is not whether the federal officers are to be punished for having made use of the evidence obtained through the use of wiretaps, but rather whether such evidence is admissible at all. The basis for excluding any kind of illegally obtained evidence is not punishment of the offender but the vindication of a public policy. *Cf.* Reed, J., in *Upshaw* v. *United States,* 335 U. S. at 418-422. In the case of evidence obtained by tapping telephone conversations, such inadmissibility rests on 47 U. S. C. § 605, while punishment for having made the interception is prescribed by 47 U. S. C. § 501. Consequently here, where admissibility alone is in issue, it makes not a particle of difference whether the federal officers knew or were ignorant of the source of the illegal evidence that they used.

The analogy here is that of evidence tainted by perjury, and the controlling precedent comes from the last Term. *Mesarosh* v. *United States,* 352 U. S. 1. There a conviction was set aside because evidence duly adduced by the prosecution at the trial, without knowledge of its falsehood, was later found to be untrue. This Court rejected the Government's request that the case be remanded for an ascertainment of the impact of the false testimony; it reversed, holding that no conviction based on such tainted evidence could be permitted to stand.

Surely there can be no difference between a conviction tainted by untruthful testimony, not known to be such when offered by the Government but involving perjury in violation of 28 U. S. C. § 1621, and a conviction tainted with testimony obtained by means which violate 47 U. S. C. § 501, not known to have been such when offered by the Government.

The question is therefore not whether the Government knew of the taint when the evidence was first adduced; it is whether at the trial there was a showing that to divulge that testimony would have run counter to the command of § 605 and would have involved a violation of the offence denounced by § 501. No further showing is necessary.

F. Federal law should not be enforced by violating federal law.

When, nearly a generation ago, this Court sustained a federal conviction resting on wiretapped evidence obtained in violation of state law, Mr. Justice Holmes characterized the proceeding as "dirty business." *Olmstead* v. *United States,* 277 U. S. 438, 469, 470. The rule of that case, that wiretapping does not violate the Fourth Amendment's prohibition against searches and seizures, still stands, despite several subsequent opportunities to strike it down. See *Goldman* v. *United States,* 316 U. S. 129, 136; *On Lee* v. *United States,* 343 U. S. 747, 758, 762. Nor is there any present reason again to reach the constitutional issue; the case at bar can be disposed of under the statute.

Mr. Justice Holmes was "not prepared to say that the penumbra of the 4th and 5th Amendments covers the defendant." 277 U. S. at 469. His comment about

"such dirty business" was evoked by the circumstance that what the federal officers did in *Olmstead* involved the commission of a crime under state law, and so he concluded (277 U. S. at 471) that "if we are to confine ourselves to precedent and logic, the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law."

If we start from Mr. Justice Holmes' premise that a violation of state law by federal officers is "dirty business", then the present case is, in two respects, even dirtier business.

First, taking §§ 501 and 605 of 47 U. S. C. together, it is plain that, by causing the existence, the substance, and the fruits of the intercepted message to be divulged in the courtroom, the federal officers concerned violated not state but federal law. They have caused to be violated (*cf.* 18 U. S. C. §§ 2, 3) the law of the very government from which they derive their authority.

Second, whereas the admission into evidence at the *Olmstead* trial of the information obtained by committing a violation of state law did not involve a further violation of that law, in the present case the divulging of the wiretapped evidence in the courtroom violated the express prohibition of § 605 and may well have violated § 501 as well, certainly after the tainted source became apparent. In the present case, therefore, the very act of convicting petitioner for a violation of federal law necessarily involved the violation of another federal law.

CONCLUSION

Enforcement of federal law in a federal court may not rest on the fruits of a violation of federal law. The judgment of the court below should therefore be reversed.

Respectfully submitted,

GEORGE J. TODARO
135 Broadway
New York, N. Y.

JACOB KOSSMAN
1325 Spruce Street
Philadelphia 7, Pa.
Counsel for the Petitioner

No. 231

In the Supreme Court of the United States

OCTOBER TERM, 1957

SALVATORE BENANTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 231

SALVATORE BENANTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1957 (R. 42), and a petition for rehearing was denied on June 4, 1957 (R. 48). The petition for a writ of certiorari was filed on June 28, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a federal court properly admitted evidence obtained solely by state officers seeking to

enforce state law where their search flowed from a telephone conversation intercepted pursuant to a state warrant authorized by state law.

STATUTES INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, 48 Stat. 1103, 47 U. S. C. 605, provides:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having be-

come acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Section 813-a of the New York Code of Criminal Procedure provides:

Ex parte order for interception. An ex parte order for the interception of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone line or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may

produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than six months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based shall be delivered to and retained by the applicant as authority for intercepting or directing the interception of the telegraphic or telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same.

STATEMENT

Following a jury trial, petitioner was convicted on a two-count indictment which charged possession of alcohol without having tax stamps affixed to the containers, and transportation of the same alcohol, in violation of 26 U. S. C. 5008 (b) (1) and 5642 (R. 3, 7, 32). Petitioner was sentenced to eighteen months imprisonment on each count, the sentences to run concurrently (R. 32). On appeal, the convictions were affirmed.

The evidence is not in dispute, and may be summarized as follows:

The State of New York, by constitutional provision and statutory enactment, permits the interception of telephone communications where law en-

forcement officials first obtain a warrant authorizing the procedure. New York Constitution, Article 1, § 12; New York Code of Criminal Procedure, § 813–a. The warrant, obtained ex parte, is issued only upon a showing of (1) reasonable ground to believe that evidence of crime will be obtained; (2) the purpose of interception, set out with particularity; (3) identification of the particular telephone line to be tapped and the person whose communications are to be intercepted.

The New York City police, believing that petitioner and his brother were violating state law by dealing in narcotics, obtained a warrant to tap the telephone of the Reno bar in New York City frequently used by the Benantis (R. 8, 12, 17). On May 10, 1956, the state police intercepted a message between petitioner and another person to the effect that "eleven pieces" were to be transported that night. Acting on this information, the police stopped a car driven by petitioner's brother, Angelo Benanti. They did not find any narcotics but did find eleven five-gallon cans of untaxed alcohol (R. 14). Federal authorities were notified and this prosecution followed.

The fact that the search came as the result of a telephone interception was not known to federal authorities until the cross-examination of one of the New York police officers (R. 28). At that point, defense counsel moved to suppress the evidence obtained by the search. The motion was denied on the grounds that no federal officer participated in the interception or the search and seizure, and that state law authorized the interception (R. 28). The Court of Appeals held

that the action of the New York police was in violation of Section 605 of the Federal Communications Act which forbids wiretapping, but that the evidence obtained as a result of this interception was admissible because no federal officer had participated in either the interception or the search and seizure (Pet. App. A).

ARGUMENT

The decision below accords with the prior decisions of this Court. In *Weeks* v. *United States*, 232 U. S. 383, 398, the Court held that it was not error to permit the use in a federal trial of papers and property improperly seized by state policemen for "it does not appear that they acted under any claim of Federal authority * * *." And in *Byars* v. *United States*, 273 U. S. 28, 33, Justice Sutherland for a unanimous Court said:

> We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account.

Petitioner does not take issue with this general rule upon which the decision of the Court of Appeals rests. He states (Pet. 5):

> It is now settled that the fruit of an illegal search and seizure by federal officers is inadmissible in a federal court. *Weeks* v. *United States*, 232 U. S. 383. It has likewise been held that the fruit of an illegal search and seizure by state officers is admissible in both state and federal courts.

Petitioner does ask this Court to develop a special rule for evidence flowing from wiretaps. His theory is that the prohibitions of Section 605 of the Federal Communications Act (*supra*, pp. 2–3) are somehow more restrictive on state conduct than the Constitutional prohibitions against search and seizure embodied in the due process clause of the Fourteenth Amendment, and that the statute requires the exclusion from federal proceedings of evidence obtained by wiretapping, even though no federal officer had anything to do with the wiretap. There is no merit in this contention which is disproved by the purpose and history of the exclusionary rule.

This Court recognized in *Wolf* v. *Colorado*, 338 U. S. 25, that the federal Constitution, by virtue of the Fourteenth Amendment, prohibits an unreasonable search or seizure by state officers; at the same time, the Court held that the state courts were not required to enforce the right of privacy by excluding evidence unlawfully obtained. But this difference between the rule in the federal courts and that binding on the states is not based on the theory that the Fourth Amendment is more important than the Fourteenth, or that state officers may violate the law where federal officers may not. The purpose of the federal rule is to discourage unlawful conduct, and the only persons as to whom such a rule in the federal courts is effective are federal officers. If an unlawful search or seizure was not participated in by federal agents, a rule of exclusion in the federal courts would not tend to preserve the right of privacy recognized by the

Fourth Amendment. State officers enforcing state law who conduct an illegal search and seizure would not be deterred from future violations by an exclusionary rule in the federal courts. Such a ruling would impede federal prosecution without furthering the judicial policy of discouraging future arbitrary intrusions on individual privacy.

It is for this reason that the exclusionary rule applies only where there has been participation in the illegal or unconstitutional conduct by federal officers. *Lustig* v. *United States,* 338 U. S. 74; *Irvine* v. *California,* 347 U. S. 128, 136. And as stated in Justice Frankfurter's opinion in *Lustig* v. *United States,* 338 U. S. 74, 78–79, a search "is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter."

The rationale which limits the federal exclusionary rule, as to searches and seizures, to federal officers applies to wiretapping as well. While the protection accorded telephone conversations arises from Section 605, and not from the Fourth Amendment, the kind of privacy protected by the former is similar to that preserved by the latter. *Nardone* v. *United States,* 308 U. S. 338, 340–341; *Goldstein* v. *United States,* 316 U. S. 114, 120–121. Just as the states need not, under the Fourth and Fourteenth Amendments, adopt the exclusionary rule as to evidence illegally seized, so, under Section 605, the states need not exclude evidence obtained by wiretapping. *Schwartz* v. *Texas,* 344 U. S. 199. Similarly, just as the Fourth Amend-

ment and the *Weeks* rule do not require that federal courts exclude evidence unlawfully seized by state officers enforcing state law, Section 605 and the *Nardone* rule do not require that federal courts exclude evidence obtained by wiretapping by state officers enforcing state law. Under *Schwartz* v. *Texas*, 344 U. S. 199, state officers will not be deterred from engaging in wiretapping by the exclusionary rule which petitioner seeks. The purpose of a wiretap by a state officer is to obtain evidence of a violation of state law—evidence which the Court has already held to be admissible in state prosecutions.[1]

It would be particularly inappropriate for a federal court to apply its rule of exclusion to a situation such as that presented in the instant case, where the interception was done pursuant to a state warrant issued by authority of state law, with the kind of protection afforded by search warrants. There is room for doubt that Section 605 extends so far as to prohibit a state from legislating for limited interceptions under specific guarantees, so that it is debatable whether the interception in this case was illegal. But, in any event, where state officers enforcing state law act in con-

[1] Even if there might be some basis for construing Section 605 to preclude the knowing use by federal officers of evidence obtained by wiretaps, where they had no participation in the wiretapping, this is not that case. The federal officers were unaware of the antecedent wiretap:

> It is clear beyond cavil that no federal officer participated in any way in the wiretap or even knowingly offered any evidence which was discovered as a result of the wiretap. [Pet. App. 3a]

formity with the law of their state, the evidence thus obtained should not be excluded by a federal court.[2]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys.

JULY 1957.

[2] Petitioner attempts to show conflict between this case and *Rathbun* v. *United States*, 236 F. 2d 514 (C. A. 10), pending on writ of certiorari, No. 30, this Term; *United States* v. *White*, 228 F. 2d 832 (C. A. 7); and *United States* v. *Bookie*, 229 F. 2d 130 (C. A. 7). However, all of those cases hold that there was no illegal "interception" of a telephone conversation on the facts of the particular case. Hence there was no occasion for the courts to reach the question of whether illegally obtained evidence would be admissible where state officers listened in on telephone conversations.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
RUFUS D. McLEAN,
Acting Assistant Attorney General,
JOHN F. DAVIS,
Assistant to the Solicitor General,
BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys,
Department of Justice, Washington 25, D. C.

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OPINION BELOW

The opinion of the Court of Appeals is reported at 244 F. 2d 389.

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QUESTION PRESENTED

Whether a federal court properly admitted evidence obtained by state officers, seeking to enforce

state law, in the course of a search resulting from a telephone conversation intercepted pursuant to a state court warrant authorized by state law.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Section 605 of the Federal Communications Act of June 19, 1934, 48 Stat. 1103, 47 U. S. C. 605, provides:

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munication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Article 1, Section 12, Constitution of the State of New York, provides in pertinent part:

* * * * *

The right of the people to be secure against unreasonable interception of telephone and telegraph communication shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. [Adopted by Constitutional Convention of 1938; approved by the people Nov. 8, 1938.]

Section 813–a of the New York Code of Criminal Procedure provided:

Ex parte order for interception. An ex parte order for the interception of telegraphic or tele-

phonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone line or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than six months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based shall be delivered to and retained by the applicant as authority for intercepting or directing the interception of the telegraphic or telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same.

STATEMENT

Following a jury trial, petitioner was convicted on a two-count indictment which charged possession of alcohol without having tax stamps affixed to the containers, and transportation of the same alcohol, in violation of 26 U. S. C. 5008 (b) (1) and 5642 (R. 3, 7, 32). Petitioner was sentenced to eighteen months' imprisonment on each count, the sentences to run concurrently (R. 32). On appeal, the convictions were affirmed.

The evidence is not in dispute (Pet. Br. 3–4) and may be summarized as follows:

The State of New York, by constitutional provision and statutory enactment, permits the interception of telephone communications where law enforcement officials first obtain a warrant authorizing the procedure. New York Constitution, Article 1, § 12; New York Code of Criminal Procedure, § 813–a, *supra*, pp. 3–4. The warrant, obtained ex parte, is issued only upon a showing of (1) reasonable ground to believe that evidence of crime will be obtained; (2) the purpose of interception, set out with particularity; (3) identification of the particular telephone line to be tapped and the person whose communications are to be intercepted. Applications for interception warrants may be made only by the attorney general, a district attorney, or a police officer having rank above that of sergeant. Applications may be made only to a judge of the Court of General Sessions, a County Court, or the New York Supreme Court. All of these

courts have superior criminal jurisdiction, *i. e.*, jurisdiction of the prosecution and trial of felonies.

The New York City police, believing that petitioner and his brother were violating state law by dealing in narcotics, obtained a warrant to tap the telephone of the Reno bar in New York City frequently used by the Benantis (R. 8, 11–12, 15–16). On May 10, 1956, the state police intercepted a message between petitioner and another person to the effect that "eleven pieces" were to be transported that night. Acting on this information, the police stopped a car driven by petitioner's brother, Angelo Benanti. They did not find any narcotics, but did find eleven five-gallon cans of untaxed alcohol (R. 14). Federal authorities were notified and this prosecution followed.

The fact that the search came as the result of a telephone interception was not known to federal authorities until the cross-examination of one of the New York police officers (R. 11, 29). At that point, defense counsel moved to suppress the evidence obtained by the search. The motion was denied on the grounds that no federal officer participated in the interception or the search and seizure, and that state law authorized the interception (R. 28). The Court of Appeals held that the action of the New York police was in violation of Section 605 of the Federal Communications Act which forbids wiretapping, but that the evidence obtained as a result of this interception was admissible because no federal officer had participated in either the interception or the search and seizure.

SUMMARY OF ARGUMENT

I

Whether or not the New York City police were violating Section 605 of the Communications Act when they intercepted telephone messages to and from the Reno Bar, their sole object was to enforce state law. They were not working with or for the federal officers. Only after the search of a suspected car revealed alcohol on which federal taxes had not been paid, did the possibility of federal law violations by the petitioner enter the picture. The evidence was then turned over to federal officials and this prosecution followed. But even at the time of trial the Assistant United States Attorney had no information that the evidence as to the alcohol resulted from the interception of telephone communications. This was brought out by petitioner on cross examination of one of the New York policemen. Thus, in this case, federal officials plainly had no connection with the alleged violation of Section 605 by the New York state officers.

The rule of exclusion adopted in the two *Nardone* cases, 302 U. S. 379, 308 U. S. 338, arose from this Court's determination that federal officials must not be permitted to introduce evidence resulting from their violation of Section 605 of the Communications Act. But the Court has recognized that this limitation does not apply to the introduction of such evidence in state cases. *Schwartz* v. *Texas*, 344 U. S. 199. On analogy to the illegal search and seizure cases, the exclusionary rule should not be applied even to trials

in federal courts where the interception was solely by state officers. Cf. *Weeks* v. *United States*, 232 U. S. 383; *Byars* v. *United States*, 273 U. S. 28; *Lustig* v. *United States*, 338 U. S. 74. The petitioner's attempt to distinguish the illegal seizure cases, on the ground that the giving of the testimony in court was itself a violation of Section 605 of the Communications Act (as a divulgence of the intercepted communication), has no application to this case since there was no testimony relied upon by the government at the trial which could be deemed a divulgence of the intercepted messages. Nor can the illegal search or seizure cases be distinguished on the ground that in those cases illegality cannot be attributed to state officials; this Court has authoritatively held the Fourteenth Amendment applicable to such searches. It is unconvincing to argue that the illegality arising from an infraction by state officers of the Communications Act is entitled to more protection than an infraction by state officers of the Constitution.

II

A second basis for upholding the refusal to exclude the evidence in this case is that the interception was not illegal because it was specifically covered by a court warrant issued pursuant to New York law. However, the court below held that Section 605 of the Communications Act is inconsistent with that law and, under the supremacy clause, must prevail. We believe this constitutes an unnecessarily literal reading of Section 605 and that, properly interpreted, that statute does not nullify the New York law.

The courts have often held that nullification of state laws by implying an inconsistency with federal law is to be avoided. In this field of intergovernmental relations every attempt is made to construe the statutes so that state and federal laws may both be given as nearly complete effect as is possible. On this basis, exceptions have frequently been read into general federal prohibitions in order to permit the states to enforce their local policies in their own way.

It is peculiarly appropriate that such a construction be given the Communications Act since by its terms it repeatedly recognizes that the states are not to be excluded from legislating concerning, nor from regulating, telephonic communications in their local aspects. Far from preempting the field, Congress deliberately and consciously sought to save the states the right to continue to protect their local interests.

Assuming, then, that Section 605 permits reasonable state legislation to aid in local law enforcement, the provisions of the New York Constitution and Code of Criminal Procedure, under which the police officers acted here, are reasonable by any standards. The safeguard of a warrant from a court is obviously designed after the customary search warrant. It may be issued only on a showing of reasonable cause. The New York statute goes even further and imposes criminal penalties for interceptions by police officers not in accordance with its provisions.

We urge that there is room under Section 605 for state laws granting specific authority to state officials to intercept telephone communications in aid of local

law enforcement, and that the particular New York constitutional and statutory provisions here involved are not illegal or nullified by Section 605 of the Communications Act.

ARGUMENT

I

THE EVIDENCE WAS ADMISSIBLE SINCE IT WAS OBTAINED BY STATE OFFICERS ENFORCING STATE LAW WITHOUT PARTICIPATION BY FEDERAL OFFICERS

In this case, New York City police, acting under a warrant issued by a New York court pursuant to the New York Constitution and Code of Criminal Procedure, obtained information which gave them probable cause to stop and search an automobile. The search revealed evidence of a federal crime which was turned over to federal authorities. In the ensuing prosecution in the federal court, the evidence was received over the objection of the petitioner that it was obtained as a result of wiretapping. Admittedly, the federal government had no knowledge that there had been wiretapping until defense counsel brought out the fact on cross-examination (Pet. Br. 18). It had not participated in any way in the interception of the message; it had not joined in the search; and it did not divulge, or induce the divulgence of, the telephone messages or their contents. Therefore, there is no basis whatsoever for petitioner's assertion (Br. 21) that the government is engaged in "dirty business." Rather, the case presents simply the issue of whether evidence obtained as the result of wire-

tapping by state officers, acting pursuant to court order and state law, should be excluded from the federal courts under Section 605 of the Federal Communications Act.

The issue thus presented is discussed at pages 26–31 of the brief for the United States in *Rathbun* v. *United States*, No. 30, this Term, which is to be argued immediately prior to this case.[1] We do not repeat the entire argument here.

In *Weeks* v. *United States*, 232 U. S. 383, 398, the Court held that it was not error to permit the use in a federal trial of papers and property improperly seized by state policemen, as distinguished from those seized by a United States marshal, for "it does not appear that they acted under any claim of Federal authority * * *." In *Byars* v. *United States*, 273 U. S. 28, 33, the Court said:

> We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account.

And in *Lustig* v. *United States*, 338 U. S. 74, 78–79, it was explained that a search "is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter."

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[1] The facts in the *Rathbun* case differ from the facts here in that the police there involved listened on an extension telephone at the invitation of one of the parties to the communication, but without court order. Also, the government sought to introduce into evidence the contents of the very messages which were overheard, rather than merely evidence discovered by tracing down leads contained in the messages.

The rationale which limits the federal exclusionary rule, as to searches and seizures, to federal officers applies to wiretapping as well. While the protection accorded telephone conversations arises from Section 605, and not from the Fourth Amendment, the kind of privacy protected by the former is similar to that preserved by the latter. *Nardone* v. *United States, supra,* 308 U. S. 338, 340–341; *Goldstein* v. *United States, supra,* 316 U. S. 114, 120–121. Just as the states need not, under the Fourth and Fourteenth Amendments, adopt the exclusionary rule as to evidence illegally seized, so, under Section 605, the states need not exclude evidence obtained by wiretapping. *Schwartz* v. *Texas,* 344 U. S. 199. Similarly, just as the Fourth Amendment and the *Weeks* rule do not require that federal courts exclude evidence unlawfully seized by state officers enforcing state law, Section 605 and the *Nardone* rule do not require that federal courts exclude evidence obtained by wiretapping by state officers enforcing state law. Since the evidence may be used in state proceedings under the *Schwartz* case, state officers will not be deterred from engaging in wiretapping by an exclusionary rule as to federal prosecutions when their purpose, as here, is solely to enforce local laws. Hence, wiretap evidence obtained by state officers without federal participation should be admitted in federal courts since the object of exclusion as to federal officers does not apply in such cases.

There is no substance to the two arguments presented by the petitioner to distinguish the admissibility of evidence illegal by reason of Section 605 of

the Commications Act from evidence obtained in violation of the Fourth Amendment. The first distinction suggested is that with respect to illegal searches the Fourth Amendment is inapplicable to state officials, while the prohibition of the interception of telephone messages applies to everyone (Pet. Br. 7–11). The difficulty with this distinction is not only that this Court has held that illegal searches by state officials may infringe the Fourteenth Amendment, *Wolf* v. *Colorado*, 338 U. S. 25, but also that the very assumption of this Court's seizure cases is that the action of the state officials was illegal; nevertheless, the evidence was held admissible at the federal trial: See *Lustig* v. *United States*, 338 U. S. 74, 77, 80; *Byars* v. *United States*, 273 U. S. 28, 29; *Burdeau* v. *McDowell*, 256 U. S. 465, 472, 475; *Weeks* v. *United States*, 232 U. S. 383, 398. Thus, the cases cannot be properly distinguished on the absence of illegality.

The second purported distinction is based on the proposition that the actual testifying by the witness was in violation of Section 605, as a divulgence of an intercepted communication from the witness stand. Whatever weight might be given this argument in a case where an attempt is made to introduce in evidence the contents of an intercepted message, it has no applicability here.[2] Not only did the Assistant United

[2] Under the language of Section 605, *supra*, pp. 2–3, both interception *and* divulgence are essential to a violation. Thus, the federal government, which by hypothesis was here entirely innocent of participation in the interception, cannot be guilty of violating the act when it produces in court evidence which came into its hands innocently. Moreover, there must have been a

States Attorney not seek to prove "the existence, contents, substance, purport, effect, or meaning" of intercepted messages, he did not even know of the existence of the messages themselves. The messages themselves formed no part of the government's case. The most that can be said is that the government's evidence at the trial came from tracing down the leads supplied by the intercepted messages. The holding in the second *Nardone* case, 308 U. S. 338, is certainly not to the effect that such traced-down evidence is itself in violation of Section 605. On analogy to *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, that case required the exclusion of evidence obtained by following leads obtained by illegal interception, in order to give full effect to the exclusion of the intercepted message itself. But neither the decision nor the opinion purported to hold that the giving of such secondary evidence in court would be a divulgence prohibited and punishable by the Communications Act.

Basically, the argument that evidence illegally seized may be introduced in evidence, while that obtained through interception of telephone communications may not, presents the odd concept that somehow a Constitutional prohibition is to be given less dignity than a statutory one (Cf. L. Hand C. J. in *United States* v. *Goldstein*, 120 F. 2d 485, 490 (C. A. 2), affirmed, 316 U. S. 114). We urge that the basis

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divulgence prior to the trial in order to bring the evidence into the hands of the government which did not participate in the interception. The Communications Act certainly could not be meant to apply to repetitions of information once divulged.

for permitting the introduction in federal trials of evidence illegally seized by state officials is valid and that, for the same reason, the evidence introduced below was properly received.

II

SECTION 605 OF THE COMMUNICATIONS ACT IS PROPERLY CONSTRUED NOT TO FORBID INTERCEPTIONS BY STATE OFFICIALS PURSUANT TO COURT ORDER AND IN ACCORDANCE WITH STATE LAW

A. A FEDERAL LAW SHOULD NOT BE CONSTRUED TO NULLIFY BY IMPLICATION A STATE LAW REGULATING ITS INTERNAL AFFAIRS.

If the New York City police, acting pursuant to a warrant issued by a state court, could legally intercept the telephone communications to and from the Reno Bar, then the trial court was entirely justified in accepting the evidence entirely apart from the argument set forth in Point I, *supra*. However, the court below held that because of the supremacy of federal law, Section 605 of the Communications Act took precedence over the New York law. We urge that, in view of the reluctance of the Court to interpret a federal law as nullifying by implication a state enactment, the Communications Act should be interpreted to permit both laws to stand.

We are dealing here with intergovernmental relations where it is important that each sovereign be permitted to act with as little restriction as possible within its field of jurisdiction so long as no undue interference is caused to the jurisdiction of the other. In line with this policy, the courts have repeatedly held that federal laws of apparently general application should not be construed to outlaw state action

which would otherwise be within state jurisdiction. Thus, in an early case before the Circuit Court for the Third Circuit, *United States* v. *Hart*, 1 Pet. C. C. 390, the question was whether a city official of Philadelphia could enforce traffic regulations against a carrier of the United States mails in spite of a statute prohibiting interference with the mail. Although the federal law contained no exception, Justice Washington construed the act as not preventing such action, stating at pages 392–393:

> The second question will depend upon the fair construction of the act of Congress, and we are of opinion that it ought not to be so construed as to shield the carrier against this preventive remedy, because a temporary stoppage of the mail may be the consequence. Suppose the officer had a warrant against a felon who had placed himself in the stage, or that the driver should commit murder in the street in the presence of an officer, and then place himself on the box; could it be contended, that the sanctity of the mail would extend to protect those persons against arrest, because a temporary stoppage of the mail would be the consequence?—we think not. It could not be said in any of those cases, that the act amounted to a wilful stoppage of the mail.

The Supreme Judicial Court of Massachusetts adopted the same view in *Commonwealth* v. *Closson*, 229 Mass. 329.

More recently, in *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261, this Court had before it and act of Congress requiring competitive bidding in the purchase of supplies for the Army. The question was whether this prevented the application of Pennsylvania law and regulations fixing minimum prices for milk. The Court held that it did not, saying at pages 274–275:

> Evidence is wanting that Congress, in authorizing competitive bidding, has been so concerned with securing the lowest possible price for articles furnished to the government that it wished to set aside all local regulations affecting price. On the contrary Congress has regarded the field of public contracts as one over which to exercise its supervisory legislative powers in safeguarding interests which may conflict with the needs of the government viewed solely as purchaser. An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication * * * should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation.

And, in dealing with the same section of the Communications Act which is now before the Court, this Court was called on in *Schwartz* v. *Texas*, 344 U. S.

199, to construe it with reference to a Texas statute permitting the use in criminal trials of evidence obtained in violation of federal law. The Court held the state law not invalid (pp. 202–203).

> Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute. If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

See also *Atchison, T. & S. F. R. Co.* v. *Railroad Commission*, 283 U. S. 380, 392–393; *Savage* v. *Jones*, 225 U. S. 501, 533; *Reid* v. *Colorado*, 187 U. S. 137, 148.

When this principle is applied to the relationship of Section 605 of the Communications Act to Article 1, Section 12, of the New York Constitution and Section 813-a of the New York Code of Criminal Procedure (*supra*, pp. 3–4), the question must be whether it clearly appears that Congress intended to prevent the New York courts from authorizing New York officials to intercept telephone calls in New York for the purpose of enforcing New York laws. An ex-

amination of the Communications Act as a whole demonstrates that Congress had no such intention.[3]

B. CONGRESS, IN THE COMMUNICATIONS ACT GENERALLY, RECOGNIZED THE INTEREST OF THE STATES IN TELEPHONE COMMUNICATIONS AND MADE PROVISION FOR STATE REGULATION

In enacting the Federal Communications Act, Congress created the Federal Communications Commission and brought radio, telephone, and telegraph communications under a single federal regulatory agency for the first time. 47 U. S. C. 151. However, Congress recognized at that time that a good deal of telephone communication is essentially a local matter. As stated by Senator Dill, Chairman of the Senate Committee on Interstate Commerce, who introduced the bill: "Ninety-eight percent of the telephone business of this country is within the States." 78 Cong. Rec. 4139. Therefore, Congress carefully preserved areas of state regulation throughout the enactment. For example, 47 U. S. C. (1952 ed.) 152 (b) provides that nothing in Chapter I of the Act [which stated the purpose of the Act, set up the federal commission (47 U. S. C. 151), stated the jurisdictional scope and application of the Act (47 U. S. C. 152), and defined

[3] *Weiss v. United States*, 308 U. S. 321, is not to the contrary. That case holds that Section 605 of the Communications Act applies to intrastate communications as well as interstate ones. But the Court was there dealing with interceptions made without specific statutory authority, not interceptions made pursuant to the warrant of a state court. It by no means follows that interceptions authorized by state law are likewise covered by the statute.

its terms (47 U. S. C. 153)] should be construed to give the commission jurisdiction over the charges, classifications, practices, services, facilities, or *regulations for or in connection with* the intrastate telephone communication service of *any* carrier. In addition, carriers who were engaged in interstate commerce solely through connection with a separate interstate carrier were completely exempt from federal control.

Senate Report No. 781, 73rd Cong., 2d Sess., p. 3, which accompanied the Communications Act in the Senate, stated that this section "* * * reserves to the States exclusive jurisdiction over intrastate telephone and telegraph communication." Senator Dill touched on this matter, saying, "We have attempted in title I to reserve to the State commissions the control of intrastate telephone traffic." 78 Cong. Rec. 8823. House Report No. 1850, 73rd Cong., 2d Sess., p. 4, was to the same effect.

The 1954 amendments reenforced the Congressional policy as to the exemption of intrastate telephone communications and intrastate carriers from federal commission control. With refereince to the amendment (April 27, 1954, c. 175, § 1, 68 Stat. 63) permitting intrastate carriers to use radio links with interstate carriers without becoming subject to the act, Senate Report 1090, 83rd Cong., 2d Sess. (repeating the substance of the House Report), which accompanied the amendment, said (pp. 1-2):

> The purpose of the legislation is to clarify the provisions of the Federal Communications Act with regard to the jurisdiction of the Federal Communications Commission over tele-

> phone and telegraph companies which are engaged primarily in intrastate activities and which therefore, should be subject to State and local regulation rather than Federal regulation. * * * The legislation is designed to make certain that the use of radio will not subject to Federal regulation companies engaged primarily in intrastate operations.

The Federal Communications Commission, commenting on this amendment, said (p. 3): "Specifically, it would amend section 2 (b) (1) of the act to make explicit that intrastate communication service, whether 'by wire or radio', will not be subject to the Commission's jurisdiction over charges, classifications, practices, services, or facilities."

47 U. S. C. 221 is another instance in which Congress demonstrated an intent to permit state regulation to displace federal control. As originally enacted (see 47 U. S. C. (1952 ed.) 221), subsection (a) provided that nothing in the subsection should be construed as limiting the power of the States to regulate telephone companies. Subsection (b) provided that nothing in the chapter dealing with common carriers was to be construed to apply to, or give the Commission jurisdiction over, the charges, classifications, practices, services, facilities, or regulations for or in connection with telephone exchange service, even though a portion of the service was interstate, where such matters were subject to State or local regulation.

Senator Dill, in referring both to this section and 47 U. S. C. 152, *supra*, said:

> We have attempted, in this proposed legislation, to safeguard State regulation by certain

> provisions to the effect that where existing intrastate telephone business is being regulated by a State commission, the provisions of the bill shall not apply. * * * [78 Cong. Rec. 8823].

Senator Clark, in proposing an amendment to section 221 which was accepted by Senator Dill and agreed to by the Senate, observed:

> Every one of these independent telephone lines throughout the United States is already subjected to local regulation by the State public-service commission, and to subject them to further regulation * * * would simply mean an intolerable burden * * *. [78 Cong. Rec. 8846].

Pertinent Congressional reports also disclose an intent to permit State commissions to regulate even interstate communications in limited areas. Senate Report No. 781, 73d Cong., 2d Sess., p. 5, House Report No. 1850, 73d Cong., 2d Sess., p. 7. Sections 152 and 153 (c) (the definition of interstate communication) make it plain that traffic within a metropolitan exchange which gives service across state lines is not deemed interstate solely because the boundaries of the metropolitan exchange do not coincide with state boundaries. For example, these sections do not apply to the New York and Washington, D. C. metropolitan exchanges which extend beyond state lines, *i. e.*, to New Jersey or Maryland. As Senator Dill stated on the floor of the Senate, 78 Cong. Rec. 8823:

> * * * We have in mind, for instance, cases where a city has telephone service connecting into a number of States, such as we have right

> here in Washington, running out into Maryland and out into Virginia, and in New York the service runs into New Jersey, and I think perhaps into Connecticut, though I am not sure about that. There are many cases in the country where, without some saving clause of that kind, the State commissions might be deprived of their power to regulate; and the State commission representatives were jealous, in the preparation of this bill, that those rights should be protected; and we have attempted to do that.

The metropolitan exchanges serving the Kansas City, Missouri-Kansas City, Kansas, area, and the Texarkana, Arkansas-Texarkana, Texas-Wakefield Village, Texas, area have been held to stand on the same footing. *General Tel. Co. of the Southwest* v. *Robinson*, 132 F. Supp. 39 (E. D. Ark.); *Southwestern Bell Tel. Co.* v. *United States*, 45 F. Supp. 403 (W. D. Mo.).

It is thus evident that Congress, in enacting the Federal Communications Act, created a scheme of regulation which would be complementary in its operation to that of the states, and not exclusive. The language and legislative history reveal that Congress envisioned a dual regulation of the telephone communications field—federal and state regulatory bodies active, each in its own sphere.[1]

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[1] In *Sugden* v. *United States*, 351 U. S. 916; this Court affirmed a holding by the Ninth Circuit that certain information obtained by Federal Communication Commission employees while monitoring broadcasts by a farm radio station which was not properly licensed could be received in evidence in a federal court. Since the Court order is *per curiam*, the reasoning behind the affirmance is not evident. However, the government argued in that case that a reading of the Act as a whole

It recognized, as it has in other fields, that the regulation of local utility business is primarily the concern of the state. See *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 341, 345–346; *North Carolina* v. *United States*, 325 U. S. 507, 511; *Palmer* v. *Massachusetts*, 308 U. S. 79; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 519; *Interstate Natural Gas Co. Inc.* v. *Federal Power Commission*, 331 U. S. 682, 690.

In the light of the consideration thus given by Congress to the interests of the states in telephone communication, it appears that there was no intention to preempt the communications field for federal regulation, so as to preclude the states (as has New York) from enacting reasonable measures governing the interception and divulgence of telephone communications by local officers enforcing local law. Judged by the criteria of supersession summarized in *Pennsylvania* v. *Nelson*, 350 U. S. 497, 502–509 (See also *Hines* v. *Davidowitz*, 312 U. S. 52), New York's law does not trench on the field occupied by the federal law. The scheme of federal regulation of communications, by its very terms, permits state regulation of intrastate telephone communications and even of a portion of interstate telephone calls. An ascertainable line of demarcation has been drawn by Congress. It therefore cannot be said that telephone

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made it clear that Congress intended to permit monitoring of broadcasts by Commission employees and that therefore Section 605 should not be read as outlawing such activity. The argument was in that respect similar to that here presented.

communication represents a field where the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject.

It follows that, since Congress has recognized intrastate telephone communication as a matter primarily of state concern, Section 605 should not be interpreted as preventing the people of a state from adopting the measures which they regard as necessary to their program of law enforcement. Our system of dual sovereignty confers responsibility for ordinary law enforcement primarily on the states. Congress, in regulating telephone communications, has recognized the interest of the states in that field. The combination of the various state interests involved in this problem suggests that only the clearest expression of Congressional intent should be permitted to prevent a state from adopting reasonable measures with respect to interception in aid of local law enforcement. Section 605 is not, we submit, that clear expression of Congressional intent to preempt the field which would prevent a state from adopting the kind of constitutional amendment and statute which New York has adopted and maintained since 1938.[5]

C. THE NEW YORK LAW, WHICH SURROUNDS PERMISSION TO WIRETAP WITH THE SAFEGUARDS NECESSARY TO SECURE A WARRANT UNDER THE FOURTH AMENDMENT, IS REASONABLE STATE REGULATION

If the states do have any authority to act in the field of telephone interception, then the New York

[5] It is of some significance that New York deliberately adopted these provisions after Section 605 of the federal Act had been on the books for some time.

legislation is clearly reasonable and would survive any attack on Fourteenth Amendment grounds. It is not even necessary to justify the legislation under the doctrine of *Olmstead* v. *United States*, 277 U. S. 438, which held that wiretapping does not constitute an unreasonable search and seizure. The New York constitution and statute surround permission to wiretap with the safeguards necessary to secure a warrant to search under the Fourth Amendment to the Constitution, apparently recognizing that the privacy violated by a search is akin to that violated by wiretapping. *Nardone* v. *United States*, 308 U. S. 338, 340–341; *Goldstein* v. *United States*, 316 U. S. 114, 120–121. The New York Constitution deals with both searches and wiretapping in Article 1, Section 12. Thus, the first paragraph forbids unreasonable searches and seizures and sets out the manner in which reasonable searches may be undertaken. The second paragraph, quoted *supra*, p. 3, provides that telephone interceptions may be made only on the basis of a warrant issued after an *ex parte* judicial hearing by a state court of general jurisdiction. Standards which must be met at this hearing are set out, just as in regard to search and seizure, and other safeguards are provided by the statute to insure that indiscriminate wiretapping will not ensue.

New York courts require that more than lip service be paid to these enactments. See *Application For Order Permitting Interception of Telephone Communications of Anonymous*, 207 Misc. 69, 136 N. Y. S. 2d 612. And Section 813-b, New York Code of Crim-

inal Procedure, as added by New York Law of April 23, 1957, c. 879, provides that law enforcement officers who intercept telephone communications unlawfully shall be guilty of a felony.* Accordingly, if the New York Constitution and statute are to be branded as illegal here, it can only be because of inevitable and irreconcilable conflict with the federal statute. For the reasons set forth above, we think there is no such irreconcilable conflict.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.

RUFUS D. MCLEAN,
Acting Assistant Attorney General.

JOHN F. DAVIS,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys.

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*"§ 813-b. *Unlawful wiretapping by law enforcement officers*
"Any law enforcement officer, not being a sender or receiver of a telephonic communication, who wilfully and by means of instrument intercepts, overhears or records a telephonic communication, or who aids, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof, and without an order as provided for under section eight hundred thirteen-a of this code, shall be guilty of a felony punishable by imprisonment for not more than two years."